Hastings Law Journal

Volume 18 | Issue 4 Article 2

1-1967

Primary Jurisdiction and the Federal Maritime Commission

Robert Fremlin

Primary Jurisdiction and the Federal Maritime Commission

By ROBERT FREMLIN*

THE steamship conference system has been the predominant influence on national shipping policy By 1916, steamship lines operating in the U.S. foreign and domestic trades had formed combinations for various objectives, the most important of which was to fix rates. After investigating these shipping combinations, Congress in 1916 approved their continued existence, immune from the antitrust laws, but only under careful governmental scrutiny The result was the Shipping Act, 1916, which continues to be the basic instrument for the regulation of shipping, both foreign and American, in the U.S. trade.

Antitrust immunity is not lightly bestowed. It is justified in the shipping industry by the unique and complex nature of ocean shipping. But it must be administered in a way that will ensure that the antitrust laws are not invaded any more than necessary to achieve the regulatory purpose, and must be administered by persons of specialized competence who understand the intricate problems of the industry and can give their full attention to them. The United States Shipping Board, a predecessor of the Federal Maritime Commission, was created by the Shipping Act to provide this administrative expertise.

The regulation of the shipping industry is not left solely to the agency, but is shared by court and Commission. The agency operates within the framework of the act, applying its specialized competence to an analysis of industry practices, while the court, with its broader range of experience, works toward a proper integration of the regulatory scheme with overall national policy

The doctrine of primary jurisdiction is a means to prevent conflicts between court and agency and to utilize the administrative expertise in aid of the judicial process. Where issues are presented to the court which, to accomplish these purposes, should be resolved by the agency, the judicial process is stayed pending referral of such issues to the administrative body After the agency has made its determination, the court may proceed on the basis of the agency's findings. The purpose of this article is to consider how the primary

* Member, San Francisco and District of Columbia Bars.

jurisdiction doctrine has been applied in maritime regulatory law to prevent conflicts between the courts and the Commission and to promote fair and effective regulation. The most important use of the doctrine is in the administration of the antitrust exemption granted to ocean rate-fixing agreements. However, the accommodation between the antitrust and shipping laws is only one area in which the doctrine is of importance, and its use will be considered in broader terms, encompassing wherever court and agency meet.

Before examining the doctrine in its shipping context, the industry conditions resulting in the Shipping Act will be discussed, followed by an analysis of the structure of the act. With this background, the justification for the primary jurisdiction doctrine in shipping regulation becomes clear, and with it an understanding of how the doctrine is utilized to distribute the regulatory function between the courts and the Commission.

Investigations of the Conference System

In 1912 the House Committee on Merchant Marine and Fisheries, under the chairmanship of Representative Joshua Alexander, began an investigation of shipping combinations in the United States foreign and domestic trades.[1] Two years later, the Alexander Committee issued its report.[2] The Committee gathered information from water and rail carriers, commercial and shipping organizations and chambers of commerce. Through the State Department it obtained reports on rates and operating practices of foreign lines engaged in the U.S. trade. The Committee also examined testimony and exhibits in the files of the Justice Department on cases pending against foreign and

[1] Anticompetitive agreements between steamship lines in the American trade existed as far back as 1868 when the New York representatives of the lines trading between the U.S. and Europe formed an agreement. Later the lines adopted for their operation the title of "Conference." Gottheil, *Historical Development of Steamship Agreements and Conferences in the American Foreign Trade*, LV ANNALS 73 (1914). Prior to the Alexander investigation the same Congress considered bills directed toward applying the Sherman Act to the conference system. Complaints of American business interests that foreign monopolies in the shipping industry were destroying independent competition stimulated legislative proposals directed against foreign shipping combinations. Subsequently it became apparent that American shipping lines were participating in these combinations, and legislation was introduced which would have applied the Sherman Act to both domestic and foreign shipping combinations. These legislative proposals were unsuccessful, and the efforts to abolish steamship conferences were abandoned. ZEIS, AMERICAN SHIPPING POLICY 74-75 (1938).

[2] House Committee on Merchant Marine & Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914) [hereinafter cited as ALEXANDER REPORT].

domestic carriers for alleged violations of the Sherman Act, and it studied the report of an investigation conducted in Great Britain by the Royal Commission on Shipping Rings.[3] Two months of hearings were held in 1913 at which all phases of the transportation industry were represented.[4] The Report reviewed the conference agreements existing in the American foreign and domestic trades and the agreements between water and rail carriers, summarized the alleged advantages and disadvantages of shipping combinations, and concluded with legislative recommendations. The findings and recommendations of the Alexander Committee became the basis for the Shipping Act, 1916, and are an invaluable guide to the statutory scheme regulating the shipping industry

The Alexander Report—Foundation of Shipping Regulatory Policy

> The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements

[3] The report of the Royal Commission on Shipping Rings, appointed in 1906, covered the first detailed investigation of the steamship conference system. The inquiry lasted three years and resulted in a majority and a minority report. Royal Commission on Shipping Rings, *Report*, CMD. 4668 (1909). The Royal Commission was appointed as the result of numerous complaints concerning the conference system, principally in the charging of excessive rates and the use of deferred rebates, under which a shipper became qualified for a rebate if he patronized conference vessels exclusively for a given period, but payment was not made unless he continued to use conference vessels for an additional period. A shipper contemplating the use of non-conference vessels thus faced the prospect of forfeiting rebates previously earned as well as those for the current period.

The minority believed deferred rebates should be prohibited, and recommended that conferences file annual reports with Parliament relating to their agreements and rebate practices. *Id.* at 95-116. The majority concluded there were definite advantages in the conference system, primarily in providing regular and frequent sailings, stable rates and uniform treatment to all shippers using conference vessels. It found checks on the monopoly power of conferences in the presence of non-conference competition, the residual competition between conference members in facilities and rates, and in the likelihood of retaliation by shipper associations if abuses continued. It rejected the suggestion to outlaw deferred rebates, believing that the advantages of the conference system depended upon an effective means of tying shippers to the conference. The majority recommended that the Board of Trade be authorized to promote settlement of controversies between carriers and shippers by conciliation or, if the parties agreed, by arbitration. It also recommended that the Board of Trade be authorized to conduct investigations of the shipping industry if national interests were affected, and that conference agreements and related documents be filed with that agency. *Id.* at 75-90. Neither the majority nor the minority concluded that conferences should be outlawed. Instead, if properly supervised, the competitive restrictions they imposed were felt to be justified by the service advantages they offered to the shipping public.

[4] For details of the Committee's information-gathering process see ALEXANDER REPORT 2-6.

> and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors.[5]

The Alexander Committee thus expressed the dilemma of reconciling maritime regulatory policy with that of the antitrust laws. The consequences of applying antitrust principles to the shipping industry to outlaw shipping combinations would be more harmful to our national interests than the inequities generated by the conference system itself. But to permit the system to flourish uninhibited was not acceptable. Some other solution had to be found, and with these considerations in mind, the Committee analyzed the evidence developed during the two year investigation.

The Alexander Committee found it was the almost universal practice for American and foreign carriers operating in the U.S. trade to regulate competition between themselves by means of written agreements or other arrangements, and that in nearly all of the trade routes to and from the United States the conference lines had achieved a virtual monopoly of the liner service. The means used by the conferences to limit competition were fixing or otherwise regulating rates, apportioning traffic by allotting sailing ports, restricting the frequency of sailings, limiting the volume of freight which certain lines could carry and pooling earnings.[6] To meet the competition of non-conference lines, the conferences employed three devices: deferred rebates, fighting ships,[7] and a contract/non-contract or dual rate con-

[5] *Id.* at 416-17.

[6] *Id.* at 415.

[7] Fighting ships were vessels supplied by the conference which followed non-conference vessels from port to port, offering space at noncompensatory rates to secure the traffic. The losses were distributed among the conference members, and the non-conference line inevitably exhausted its resources and retired from the trade.

tract system under which shippers agreeing to furnish all of their cargo to conference vessels were granted a contract rate which was less than the non-contract rate offered to other shippers.[8]

The record showed there were definite advantages in the conference system, such as

> greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination.[9]

But it was also clear that discriminatory practices were widespread. The main complaints concerned the monopolistic nature of conferences which was being exploited to throttle independent competition, the power of the combinations to adjust rates arbitrarily so that except when a rate war was being waged against independent competition, the rates charged by conference members were excessive, and the domination of shippers to such an extent that shippers could not voice their grievances for fear of retaliation by the conference. The Alexander Committee concluded that these abuses were inherent in the conference system and could only be eliminated by effective Government control. Two options were open to the Committee: conference agreements could be prohibited and unrestricted competition restored, or the agreements could be continued, subject to Government regulation designed to eliminate the discriminatory practices found by the Committee. For the reasons expressed in the quotation which opened this section, the Committee concluded that the wiser course would be the latter.[10]

It was apparent to the Committee that regulation had to take into account the unique problems of the shipping industry Witnesses stressed the differences between water and rail transportation. Steamship lines, unlike railroads, are not tied to a definite route and may go wherever the cargo is most profitable. If one trade becomes lucrative, vessels are drawn to it and it soon becomes overtonnaged. Rate structures differ between water and rail carriage because rail cars can be removed when cargo offerings on a rail shipment are limited, but this is impossible in the steamship industry and when cargo cannot be developed a vessel must sail with space used and unused. Rate levels are also affected by tramp vessels not sailing on fixed schedules,

---

[8] ALEXANDER REPORT 287-92.

[9] *Id.* at 416.

[10] *Id.* at 415-18.

operating wherever freight is offered and at constantly changing rates. Moreover, world conditions govern ocean transportation, and the United States in regulating the rates and practices of foreign-flag carriers must consider the interests of other governments in the welfare of their nationals.[11]

The Alexander Committee recommended that carriers engaged in the U.S. foreign trade be placed under the jurisdiction of the Interstate Commerce Commission,[12] and that all agreements and other arrangements, and modifications and cancellations thereof, be filed for approval by the agency, which should be given the authority to cancel any agreement found to be discriminatory, unfair or detrimental to United States commerce. The Committee further recommended that the use of fighting ships and rebates, deferred and otherwise, be made illegal, discrimination between shippers or ports prohibited, and that the agency be empowered to investigate complaints concerning rates, commence proceedings on its own initiative and award reparations where appropriate.[13]

The Alexander Committee went much further than the Royal Commission in the restraints that it recommended be imposed on conferences. However, the findings of the Committee confirmed those of the Royal Commission that, because of the advantages inherent in the conference system, these shipping combinations should not be abolished. Three precepts emerge from the Alexander Report which have formed the basis for the development of the primary jurisdiction doctrine in shipping regulation—ocean shipping is unique; it is complex; and it requires a limited exemption from the antitrust laws.[14]

---

[11] *Id.* at 309-10.

[12] Congress subsequently found that public opinion seemed to favor creating a new agency to regulate the shipping industry, rather than adding to the duties and responsibilities of the Interstate Commerce Commission. H.R. REP. No. 659, 64th Cong., 1st Sess. 32 (1916); S. REP. No. 689, 64th Cong., 1st Sess. 12 (1916). This agency, created by the Shipping Act, 1916, was the United States Shipping Board.

[13] ALEXANDER REPORT 419-21.

[14] The conference system has subsequently been the object of two careful congressional studies. The findings of each of these investigations recognize the unique problems involved in regulating the shipping industry, and the need for some departure from traditional antitrust concepts. A three year investigation of antitrust problems in the shipping industry was conducted by the Antitrust Subcommittee of the House Committee on the Judiciary under the chairmanship of Representative Emanuel Celler, resulting in the report of the STAFF OF HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 2D SESS., REPORT ON THE OCEAN FREIGHT INDUSTRY (Comm. Print 1962) [hereinafter cited as CELLER REPORT]. The Celler Committee acknowledged that it "recognizes the unique character of the ocean shipping industry with respect to the application of the antitrust laws. No other governments inhibit their carriers by antitrust laws, and American ocean

The Alexander Committee's recommendations were not implemented until two years later when, on September 7, 1916, with the Alexander Report as its guide, the Shipping Act, 1916,[15] was enacted. The Shipping Act has since then set the pattern for the regulation of the shipping industry

The Shipping Act, 1916—A Comprehensive Regulatory Scheme

The most important provision of the Shipping Act is section 15,[16] which grants an express immunity from the antitrust laws. Section 15 requires that every common carrier and other person subject to the act file with the Federal Maritime Commission[17] every agreement, or any modification or cancellation thereof, which fixes or regulates transportation rates; grants special rates, accommodations, or other privileges; regulates or destroys competition; pools or apportions earnings, losses, or traffic; allots ports or regulates sailings; regulates the volume of freight or passenger traffic; or in any manner provides for an exclusive, preferential or cooperative working arrangement. The Commission is required to disapprove, cancel or modify any agreement, modification or cancellation thereof, whether or not previously approved, that it finds unjustly discriminatory, detrimental to the U.S. commerce, contrary to the public interest, or in violation of the Shipping Act. Approved agreements are lawful and are exempt from the antitrust laws.[18] Section 15 further provides that persons violating any

---

carriers must compete, not within the framework of our domestic antitrust laws, but in the jungle world of ocean shipping cartels." *Id.* at 382.

The second conference investigation resulted in Pub. L. No. 87-346 (approved October 3, 1961), 75 Stat. 762 (1961), 46 U.S.C. § 813a (1964), which clarified the status of conference exclusive patronage or dual rate agreements, which were of doubtful legality after Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481 (1958). For a discussion of the *Isbrandtsen* case see text accompanying notes 113-122 *infra*. The House Committee on Merchant Marine and Fisheries which considered the proposed dual rate legislation, reaffirmed the importance of continuing the conference system, and, like the Alexander and Celler Committees, concluded that the industry required some exemption from the antitrust laws. H.R. REP. No. 498, 87th Cong., 1st Sess. 13 (1961).

[15] 39 Stat. 728 (1916), as amended, 46 U.S.C. §§ 801-42 (1964).

[16] 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814 (1964).

[17] As the result of organizational changes, five successive agencies have shared in the regulation of the shipping industry. The United States Shipping Board, 1917-1933; the United States Shipping Board Bureau of the Department of Commerce, 1933-1936; the United States Maritime Commission, 1936-1950; the Federal Maritime Board, 1950-1961, and the Federal Maritime Commission.

[18] "Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the

of its provisions shall be liable to a penalty, to be recovered by the United States in a civil action.

Section 14[19] of the act outlaws the two major predatory devices previously utilized by conferences: deferred rebates and fighting ships. It also prohibits retaliation and other discriminatory devices practiced against shippers. Violations of section 14 are misdemeanors. Section 14a[20] places upon the Commission the duty of determining whether a foreign carrier has violated section 14, or is a party to any combination or agreement covering transportation between foreign ports that involves practices enumerated in section 14, and excludes United States common carriers from admission. If the Commission makes such findings, it must certify them to the Commissioner of Customs, who is required to close United States ports to such carrier.

Section 14b, added in 1961,[21] authorizes the use of dual rate contracts by any common carrier or conference of carriers in foreign commerce when approved by the Commission pursuant to certain specified standards. Approved dual rate contracts are immune from the antitrust laws under section 15.

Carriers, shippers, consignees and other persons are prohibited by section 16[22] from knowingly, by means of false billing or other unjust or unfair devices, granting or obtaining transportation at less than the applicable rates. The section also forbids common carriers and other persons subject to the act from unduly or unreasonably preferring or prejudicing any particular person, locality or description of traffic, or from inducing any marine insurer to discriminate against a competing carrier. Violations of section 16 are misdemeanors punishable by a fine. Section 17[23] prohibits common carriers in foreign commerce from charging rates which are unjustly discriminatory between shippers or ports, or unjustly prejudicial to United States exporters as compared with their foreign competitors, and requires the Commission to order the discontinuance of such practices wherever

---

Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation

"Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title [dual rate agreements], shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto." 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814 (1964).

[19] 39 Stat. 733 (1916), as amended, 46 U.S.C. § 812 (1964).

[20] 41 Stat. 996 (1920), as amended, 46 U.S.C. § 813 (1964).

[21] Pub. L. No. 87-346, 75 Stat. 762 (1961), 46 U.S.C. § 813a (1964).

[22] 39 Stat. 734 (1916), as amended, 46 U.S.C. § 815 (1964).

[23] 39 Stat. 734 (1916), as amended, 46 U.S.C. § 816 (1964).

it finds they exist. Section 17 also requires every carrier in foreign commerce and other person subject to the act, to establish and observe just and reasonable regulations and practices relating to the receiving, handling and delivering of property, and upon a finding by the Commission that such regulations or practices exist, it may prescribe and enforce just and reasonable practices related to those services.

Section 18[24] originally required only common carriers in interstate commerce to establish just and reasonable rates, regulations and practices, to file tariffs with the Commission and to refrain from charging rates exceeding those of their tariffs. In 1961, section 18 was amended, requiring common carriers in foreign commerce and conferences of such carriers to file tariffs with the Commission and forbidding any new rates or increases in rates on less than thirty days' notice, except with special permission of the Commission. By the 1961 amendment, conferences and carriers in foreign commerce were prohibited from charging rates other than those specified in their tariffs filed with the Commission. Section 18 also requires the Commission to disapprove rates of conferences or common carriers in foreign commerce, which are so unreasonably high or low as to be detrimental to U.S. commerce. A violation of section 18 is subject to a penalty, to be recovered by the United States in a civil action.

Section 19[25] forbids common carriers in interstate commerce, who have reduced their rates to noncompensatory levels to injure a competitive carrier, from increasing their rates prior to obtaining approval from the Commission. Section 20[26] makes it unlawful for any common carrier or other person subject to the act to disclose or receive information concerning property delivered to them, which may be used to the detriment of the shipper or consignee of the cargo or of any carrier. Under section 21,[27] the Commission may require any common carrier or other person subject to the act to file reports relating to their business, and the failure to do so results in a $100 forfeiture to the United States for each day of default. The falsifying of such reports is a misdemeanor.

The Commission is given reparation powers under section 22,[28] which permits any person to file a complaint with the Commission charging a violation of the act by a common carrier or other person

---

[24] 39 Stat. 735 (1916), as amended, 46 U.S.C. § 817 (Supp. I, 1965).
[25] 39 Stat. 735 (1916), as amended, 46 U.S.C. § 818 (1964).
[26] 39 Stat. 735 (1916), as amended, 46 U.S.C. § 819 (1964).
[27] 39 Stat. 736 (1916), as amended, 46 U.S.C. § 820 (1964).
[28] 39 Stat. 736 (1916), as amended, 46 U.S.C. § 821 (1964).

subject to the act. If the complaint is filed within two years after the cause of action accrues, the Commission may award reparations for any injury caused by such violations. Under section 22 the Commission may also investigate any violation of the act on its own initiative. By section 29,[29] any violation of a Commission order, other than an order for the payment of money, is subject to injunction or other process of any federal district court having jurisdiction of the parties, at the suit of the Commission, the Attorney General or any party injured by such violation. Section 30[30] covers the enforcement of orders of the Commission for the payment of money, and provides that in case of violation of any such order, the person to whom the award was made may obtain relief from a federal district court, and in such proceeding the findings and order of the Commission shall be prima facie evidence of the facts stated therein. Such enforcement actions must be brought within one year from the date of the Commission's order.

Section 32[31] states that a violation of the act, except where a different penalty is provided, is a misdemeanor punishable by a fine not to exceed $5,000. Section 44,[32] added in 1961, governs ocean freight forwarders, and prohibits any person from engaging in the ocean freight forwarding business unless licensed by the Commission pursuant to certain statutory standards.

A study of the Shipping Act shows the broad range of persons covered by its provisions, including common carriers, independent ocean freight forwarders, and all persons carrying on the business of furnishing wharfage, warehouse or other terminal facilities in connection with a common carrier by water. The shipping practices it governs are as comprehensive as they are diverse. Some of these practices are immune from the antitrust laws. In many instances the standards of unlawful conduct have been purposely drawn in only general terms. Such factors are important to the primary jurisdiction question since they suggest the extent to which the agency's powers should be invoked in aid of judicial proceedings.

This review of the Shipping Act and the industry conditions leading to its enactment provides a background for the discussion of the development of the primary jurisdiction doctrine and its application to maritime regulation.

---

[29] 39 Stat. 737 (1916), as amended, 46 U.S.C. § 828 (1964).
[30] 39 Stat. 737 (1916), as amended, 46 U.S.C. § 829 (1964).
[31] 39 Stat. 738 (1916), 46 U.S.C. § 831 (1964).
[32] Pub. L. No. 87-254, 75 Stat. 522 (1961), 46 U.S.C. § 841b (1964).

The Doctrine of Primary Jurisdiction in Other Regulated Industries

General Principles and Application of Doctrine in Non-Antitrust Cases

The doctrine of primary jurisdiction is a means by which specialized administrative knowledge is utilized to reach a better-informed judicial result, and to prevent court interference with agency jurisdiction.

> "Primary jurisdiction" applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.[33]

The jurisdiction of the court is therefore not ousted, but only postponed.[34] On completion of the agency's task the court proceeds with its adjudication of the controversy, equipped with the administrative analysis of the referred issues. By this process the court and the agency, each operating within its sphere, work together in the common regulatory purpose.

The primary jurisdiction doctrine originated in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*[35] The plaintiff alleged that the rate charged by the defendant railway company for carrying the plaintiff's goods was unreasonably high, discriminatory and unduly prejudicial. The rate charged was that applicable under defendant's tariff which was published and filed with the Interstate Commerce Commission, as required by the Interstate Commerce Act.[36] The court concluded that a shipper seeking reparations for allegedly unreasonable rates must "under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable."[37] The danger in permitting judicial relief without prior reference to the Commission was that if a shipper obtained relief from

---

[33] United States v. Western Pac. R.R., 352 U.S. 59, 63-64 (1956).

[34] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 353 (1963).

[35] 204 U.S. 426 (1907).

[36] 24 Stat. 379 (1887) (amended by 49 Stat. 543 (1935)), 54 Stat. 929 (1940), 56 Stat. 284 (1942), 72 Stat. 568 (1958), as amended, 49 U.S.C. §§ 1-27, 301-327, 901-923, 1001-1022, 1231-1240 (1964).

[37] 204 U.S. at 448.

a court upon a finding that the established rate was unreasonable, he would thereby be given a preference over all other shippers who would not be affected by the court's order and would continue to pay the established rate. The Court was also concerned that if courts were empowered to determine the reasonableness of an established rate, no regulatory uniformity would be possible because of the potentially different judicial conclusions as to what rate is reasonable. If the determination of the reasonableness of the rate were left to the Commission, the agency could, on a finding that the rate is unreasonable, award reparations to the shipper, and also order the filing of new rates applicable to all.

The purpose of invoking agency jurisdiction in the *Abilene* case was to achieve the uniformity required by the Interstate Commerce Act. There is, however, no single rule for the application of the doctrine. In the earlier cases decided after *Abilene*, the need for uniformity was stressed.[38] Another criterion used is to distinguish between "controversies which involve only questions of law and those which involve issues essentially of fact, or call for the exercise of administrative discretion."[39] More recently the specialized knowledge of the agency involved has been emphasized.[40]

Except in controversies arising under the antitrust laws, a subject to be considered later, the primary jurisdiction doctrine has been fashioned largely from Interstate Commerce Act cases, particularly those involving the railroad industry A study of these cases is helpful not only because it facilitates an understanding of how the doctrine applies in varying circumstances, but it also suggests appropriate solutions in cases arising under the Shipping Act which in its terms and operation closely parallels the Interstate Commerce Act.[41]

The doctrine is applicable to proceedings brought to enforce the criminal provisions of the Interstate Commerce Act, as well as to civil actions.[42] The act is more regulatory and administrative than

---

[38] Keogh v. Chicago & N.W Ry., 260 U.S. 156, 163 (1922); Mitchell Coal & Coke Co. v. Pennsylvania R.R., 230 U.S. 247, 258-59 (1913); Robinson v. Baltimore & O.R.R., 222 U.S. 506, 509-10 (1912).

[39] Great No. Ry. v. Merchants Elevator Co., 259 U.S. 285, 295-96 (1922).

[40] United States v. Western Pac. R.R., 352 U.S. 59, 64 (1956).

[41] United States Nav. Co. v. Cunard S.S. Co., 284 U.S. 474, 481 (1932). See text accompanying notes 99-104 *infra*, for a discussion of the *Cunard* case.

[42] United States v. Pacific & Arctic Ry. & Nav. Co., 228 U.S. 87, 106-08 (1913). This was an indictment for alleged violations of the Sherman and Interstate Commerce Acts. Defendants were rail carriers, steamship lines and a wharfinger who allegedly conspired to eliminate and destroy competition between the United States, the Territory of

criminal, and while the violation of some of its provisions constitutes criminal conduct, the determination of whether there has been a violation may involve administrative questions. In such cases the purposes of the act are better served by withholding judicial proceedings in criminal and civil cases until the conduct has been passed upon by the Commission.[43]

Controversies involving the interpretation of a carrier's tariff fall into two categories. If the words in issue are used in their ordinary sense, the solution requires only construction rather than the exercise of administrative discretion, and the primary jurisdiction doctrine is inapplicable.[44] If, however, the terms are used in a peculiar or technical sense and their proper meaning requires an analysis of extrinsic facts within the specialized knowledge of the agency, the doctrine requires that the controversy be referred to the Commission.[45] Where the agency has already construed the tariff provision in question,[46] or has clarified the factors underlying it,[47] there is no need to refer the controversy to the agency, and the doctrine is inapplicable.

The determination of whether rates are unreasonable,[48] or unjustly discriminatory,[49] are matters within the specialized competence of the agency The primary jurisdiction doctrine also applies to questions of the reasonableness of tariff commodity classifications,[50] a carrier's routing practices,[51] the determination of the terms and conditions under which trackage rights may be acquired and abandoned,[52] and

---

Alaska and British Columbia. The district court held it was without jurisdiction to determine the controversy until issues involving the discriminatory acts of the defendants had been passed on by the Interstate Commerce Commission, on the authority of the *Abilene* case. This decision was reversed as to the Sherman Act counts, see text accompanying note 94 *infra*, but was affirmed as to the counts alleging violations of the criminal provisions of the Interstate Commerce Act.

[43] *Id.* at 107.

[44] Great No. Ry. v. Merchants Elevator Co., 259 U.S. 285, 294 (1922); St. Louis, I. Mt. & So. Ry. v. Hasty & Sons, 255 U.S. 252, 256 (1921).

[45] United States v. Western Pac. R.R., 352 U.S. 59, 66, 69 (1956); Texas & Pac. Ry. v. American Tie & Timber Co., 234 U.S. 138, 147 (1914).

[46] Crancer v. Lowden, 315 U.S. 631, 634-35 (1942).

[47] See United States v. Western Pac. R.R., 352 U.S. 59, 69 (1956).

[48] Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 448 (1907).

[49] Board of R.R. Comm'rs v. Great No. Ry., 281 U.S. 412, 424 (1930); Keogh v. Chicago & N.W Ry., 260 U.S. 156, 163-64 (1922); Robinson v. Baltimore & O.R.R., 222 U.S. 506, 511 (1912).

[50] Director Gen. of R.R. v. Viscose Co., 254 U.S. 498, 503 (1921).

[51] Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84, 87 (1962); Northern Pac. Ry. v. Solum, 247 U.S. 477, 482-83 (1918).

[52] Thomson v. Texas Mexican Ry., 328 U.S. 134, 147-48 (1946).

the determination of whether the discrimination in the particular application of a tariff provision is unreasonable.[53]

The question of whether a carrier's tariff rule is unfair, unreasonable or otherwise unlawful, is administrative in character and requires the specialized knowledge of the Commission.[54] But where a tariff rule, fair on its face, is applied unequally, or unfairly, a person injured thereby may recover damages, and no reference to the Commission is necessary.[55] And where, under the circumstances of the case, the tariff rule is inapplicable to the controversy, no primary jurisdiction questions are involved.[56]

The charging of non-tariff rates,[57] and the payment of rebates,[58] practices clearly unlawful, are not matters involving administrative discretion, and fall outside the scope of the doctrine.

When the doctrine is applied and the controversy referred to the agency, the appropriate action is to stay the judicial proceedings, not to dismiss them.[59] But where the relief requested can be granted only by the agency,[60] or where the period of limitations for the filing of complaints with the administrative body expired prior to the institution of the judicial proceedings,[61] no purpose is served in continuing the suit and a dismissal is appropriate.

---

[53] St. Louis, B. & M. Ry. v. Brownsville Nav. Dist., 304 U.S. 295, 301 (1938).

[54] Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411, 421-22 (1959); General Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 431-32 (1940); Midland Valley R.R. v. Barkley, 276 U.S. 482, 484-85 (1928); Morrisdale Coal Co. v. Pennsylvania R.R., 230 U.S. 304, 314 (1913); Mitchell Coal & Coke Co. v. Pennsylvania R.R., 230 U.S. 247, 263-64 (1913); Baltimore & O.R.R. v. United States *ex rel.* Pitcairn Coal Co., 215 U.S. 481, 498 (1910); ICC v. Illinois Cent. R.R., 215 U.S. 452, 477-78 (1910).

[55] Illinois Cent. R.R. v. Mulberry Hill Coal Co., 238 U.S. 275, 281-83 (1915); Pennsylvania R.R. v. Puritan Coal Mining Co., 237 U.S. 121, 131-32 (1915). *Cf.* St. Louis, B. & M. Ry. v. Brownsville Nav. Dist., 304 U.S. 295, 301 (1938), which held that when the question is whether the discrimination in the application of the tariff is "unreasonable," the controversy is administrative in nature.

[56] Pennsylvania R.R. v. Sonman Shaft Coal Co., 242 U.S. 120, 126 (1916); see Eastern Ry. v. Littlefield, 237 U.S. 140 (1915).

[57] Pennsylvania R.R. v. International Coal Mining Co., 230 U.S. 184, 196-97 (1913).

[58] Mitchell Coal & Coke Co. v. Pennsylvania R.R., 230 U.S. 247, 260-61 (1913).

[59] *Id.* at 266-67; Thompson v. Texas Mexican Ry., 328 U.S. 134, 151 (1946); General Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 433 (1940).

[60] See St. Louis, B. & M. Ry. v. Brownsville Nav. Dist., 304 U.S. 295, 301 (1938). In Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 253 (1951), the Court said: "In no instance have we directed a court to retain a case in which it could not determine a single one of its vital issues."

[61] Morrisdale Coal Co. v. Pennsylvania R.R., 230 U.S. 304, 314-15 (1913). In United States v. Western Pac. R.R., 352 U.S. 59, 72-73 (1956), however, it was held that the expiration of the regulatory period of limitations does not bar reference to the agency of questions raised solely by way of defense and within the agency's primary jurisdiction.

Primary Jurisdiction and the Antitrust Laws

In antitrust proceedings involving the regulated industries the courts must decide whether the regulatory statute protects the disputed activities from the antitrust laws expressly or by implication. If the regulatory statute expressly immunizes the conduct, the antitrust laws are superseded to the extent of any such immunity Even though the activity is not specifically exempt, the statutory scheme may reflect a clear legislative intent to supersede the antitrust laws as to that activity The result is a *pro tanto* repeal of the antitrust laws by implication. When the court determines that the regulatory statute has superseded the antitrust laws as to the specific acts charged, its jurisdiction is thereby ousted. The issue is solely whether the acts are governed by the regulatory or the antitrust laws. If it is the regulatory statute that applies, the agency has exclusive jurisdiction, subject to judicial review, and that ends the matter.

Repeals, express or implied, should be distinguished from the result achieved where the doctrine of primary jurisdiction is applicable. The regulatory scheme may require that some initial determination be made by the agency before antitrust remedies are invoked. Where there are such matters for the special competence of the administrative agency, judicial proceedings are stayed pending the agency's findings. The immediate result is to defer, rather than displace, the antitrust remedy In some instances the conduct, viewed in the light of the agency's findings, may qualify for antitrust immunity under the regulatory statute. The application of the primary jurisdiction doctrine may thus be preliminary to a finding that the antitrust laws have been superseded.

In the non-maritime antitrust cases, *pro tanto* repeal has played the prominent role in the accommodation between the regulatory and antitrust laws. Instead of determining that there are matters requiring the special competence of the administrative agency necessitating a stay of the judicial proceedings, the Supreme Court has examined the conduct in the light of the regulatory statute and concluded either that the district court had jurisdiction under the antitrust laws, or that it did not. The primary jurisdiction doctrine has been discussed, but has not been the basis for the Court's decision. The doctrine has had more importance in the shipping cases, which will be discussed separately, following an examination of the means used to resolve conflicts between court and agency in antitrust litigation in other regulated industries.

First, however, it should be emphasized that the regulated indus-

tries are not per se exempt from the antitrust laws.[62] Moreover, *pro tanto* repeals of the antitrust laws by regulatory statutes are not favored,[63] and must be based upon a clear repugnancy between the antitrust laws and the regulatory statute.[64]

The non-maritime cases have discussed both *pro tanto* repeal and primary jurisdiction, although the result in each instance was that the agency or the court had exclusive jurisdiction of the controversy Thus, in *United States v. Borden Co.*,[65] and *Maryland & Va. Milk Producers Ass'n v. United States*,[66] the Court found that the Agricultural Marketing Agreement Act of 1937,[67] the Capper-Volstead Agricultural Producers' Associations Act,[68] and Section 6 of the Clayton Act,[69] did not operate to repeal Sections 1 and 2 of the Sherman Act as applied to the activities of agricultural cooperative associations. The Court further found that the authority given to the Secretary of Agriculture under Section 2 of the Capper-Volstead Act[70] to issue cease and desist orders upon finding that an agricultural association had monopolized or restrained trade did not vest the Secretary with primary jurisdiction to make such findings in Sherman Act prosecutions. The limited procedures of the Capper-Volstead Act were not intended as substitutes for the Sherman Act, and were not intended to postpone or prevent prosecution of the antitrust laws.

Pro tanto repeal and primary jurisdiction were blended in *United States Alkali Export Ass'n v. United States.*[71] The defendants' activities were admittedly outside the scope of the Sherman Act immunity granted by Section 2 of the Webb-Pomerene Export Trade Act,[72] relating to export associations, but the procedures outlined in Section 5 of the Webb-Pomerene Act,[73] which authorized the Federal Trade

[62] Georgia v. Pennsylvania R.R., 324 U.S. 439, 456 (1945).

[63] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963); Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963); California v. FPC, 369 U.S. 482, 485 (1962); Georgia v. Pennsylvania R.R., 324 U.S. 439, 456-57 (1945); United States Alkali Export Ass'n v. United States, 325 U.S. 196, 206 (1945); United States v. Borden Co., 308 U.S. 188, 198 (1939).

[64] United States v. Philadelphia Nat'l Bank, *supra* note 63, at 350-51, Georgia v. Pennsylvania R.R., *supra* note 63, at 456-57; United States v. Borden Co., *supra* note 63, at 198-99.

[65] 308 U.S. 188 (1939).

[66] 362 U.S. 458 (1960).

[67] 50 Stat. 246 (1937), as amended, 7 U.S.C. §§ 601-74 (1964).

[68] 42 Stat. 388 (1922), 7 U.S.C. §§ 291-92 (1964).

[69] 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964).

[70] 42 Stat. 388 (1922), 7 U.S.C. § 292 (1964).

[71] 325 U.S. 196 (1945).

[72] 40 Stat. 517 (1918), 15 U.S.C. § 62 (1964).

[73] 40 Stat. 517 (1918), as amended, 15 U.S.C. § 65 (1964).

Commission to investigate alleged violations of the Sherman Act by export associations and, if necessary, to refer its findings and recommendations to the Attorney General for appropriate action, were asserted by the defendants as prerequisites to any judicial proceedings under the Sherman Act. After observing that prior to the passage of the Webb-Pomerene Act, the Department of Justice had plenary authority to institute antitrust suits without prior recourse to other agencies, the Court stated, "a *pro tanto* repeal of that authority, by conferring upon the Commission primary jurisdiction to determine when, if at all, an antitrust suit may appropriately be brought, would require a clear expression of that purpose by Congress."[74] The *pro tanto* repeal considered here was not a repeal of the antitrust laws by the Webb-Pomerene Act, which would have been its conventional use, but a "repeal," through the application of the primary jurisdiction doctrine, of the immediate right to prosecute under the Sherman Act, pending the agency's determination, which seems a curious use of the doctrine of *pro tanto* repeal.

In *United States v. Radio Corp. of America*,[75] the question was whether approval by the Federal Communications Commission of an exchange of television stations under Section 310(b) of the Communications Act of 1934,[76] barred suit by the Government in which the transaction was challenged under Section 1 of the Sherman Act. The Court first reviewed the legislative history of the Communications Act and found that it gave the FCC no power to decide antitrust issues as such, and that FCC approval of the transaction did not prevent enforcement of the antitrust laws in the courts. The effect of this holding was that the Communications Act did not constitute a *pro tanto* repeal of the antitrust laws as to such approved exchanges. The Court then stated "we now reach the question whether, despite the legislative history, the over-all regulatory scheme of the Act requires invocation of a primary jurisdiction doctrine."[77] The Court concluded the doctrine was not applicable, and consequently the opinion does not reveal what issues would have been referred to the Commission had the decision been otherwise. Because the agency had already approved the transaction and could not confer immunity thereby, it is questionable whether the primary jurisdiction doctrine could have served any purpose.[78]

[74] 325 U.S. at 206.

[75] 358 U.S. 334 (1959).

[76] 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 310(b) (1964).

[77] 358 U.S. at 346.

[78] *Cf.* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 353-54 (1963).

California v. FPC,[79] held that Section 7(c) of the Natural Gas Act,[80] which authorized the Federal Power Commission to approve the acquisition of assets of natural gas companies, did not operate as a repeal of the antitrust laws as to such transactions, and approval by the agency did not bar a suit by the Government charging that the acquisition of the assets violated Section 7 of the Clayton Act.[81]

A *pro tanto* repeal of the Sherman Act was, however, found in *Pan American World Airways, Inc. v. United States*.[82] The Court found that the broad powers granted to the Civil Aeronautics Board by the Federal Aviation Act of 1958,[83] to grant or deny operating certificates to air carriers, to investigate deceptive and unfair methods of competition, and to approve purchases, mergers and arrangements between common carriers and air carriers with exemption from the antitrust laws, gave to the Board exclusive jurisdiction of all questions of injunctive relief against such activities.[84] The Court made it clear, however, that the antitrust laws were not completely displaced, and that questions of criminal law enforcement, and violations of antitrust laws other than those enumerated in the act, were left to the courts.[85]

---

[79] 369 U.S. 482 (1962).

[80] 52 Stat. 824 (1938), as amended, 15 U.S.C. § 717f(c) (1964).

[81] 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964). The situation was held to be one in which the agency, rather than the court, should have stayed its hand. The Court concluded that where a Clayton Act proceeding is pending before a district court involving the stock acquisition of a pipeline company, the FPC should stay its hand in a related proceeding in which, subsequent to the purchase of the stock, approval of the FPC was sought to acquire the assets of the pipeline company. 369 U.S. at 490.

[82] 371 U.S. 296 (1963). The Government, at the request of the Civil Aeronautics Board, brought a civil suit against Panagra and its equal shareholders, Pan American and W R. Grace & Co., a common carrier, charging violations of §§ 1, 2 and 3 of the Sherman Act. The complaint alleged that under the agreement forming Panagra, a territorial division of air service was made, designed to avoid competition between Panagra and Pan American. Also alleged was a conspiracy and monopoly by Pan American and Grace of air service in certain areas of the U.S. and South America. Finally, Pan American was charged with using its 50% control of Panagra to prevent it from obtaining CAB approval of a competing air service. The transactions resulting in the territorial divisions occurred before the passage of the first statute regulating the air industry.

[83] 72 Stat. 737 (1958), as amended, 49 U.S.C. §§ 1301-542 (1964).

[84] "Limitation of routes and divisions of territories and the relation of common carriers to air carriers are basic in this regulatory scheme. The acts charged in this civil suit as antitrust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers." 371 U.S. at 305. Although Board approval of the Panagra relationship was not required because it pre-dated the regulatory statute, the Court declared that the Board had ample authority to deal with all unfair methods of competition, including those which commenced before the statute. *Id.* at 303.

[85] Mr. Justice Brennan and Mr. Chief Justice Warren, dissenting, believed that by

Both *pro tanto* repeal and primary jurisdiction were discussed by the Court in *United States v. Philadelphia Nat'l Bank.*[86] The Court held that the Bank Merger Act of 1960,[87] under which the Comptroller of the Currency had authority to approve bank mergers, did not immunize approved mergers from the antitrust laws, since no express immunity was conferred by the act and no repugnancy was found between the antitrust laws and the regulatory provisions. As to the question of primary jurisdiction, the Court concluded that even if the doctrine applied, it would not bar the suit because the proceedings before the Comptroller were completed before the antitrust suit was filed. "Furthermore, the considerations that militate against finding a repeal of the antitrust laws by implication from the existence of a regulatory scheme also argue persuasively against attenuating, by postponing, the court's jurisdiction to enforce the antitrust laws."[88]

A comparison of the antitrust cases involving the transportation industries with those relating to other regulated industries shows that the scope of the agency's powers is important in determining whether there is any need for an accommodation between the regulatory and antitrust laws.[89] The need for the doctrine to reconcile antitrust and

specifically exempting certain transactions, such as consolidations and mergers, from the antitrust laws, Congress intended that the antitrust laws apply to all other activities, including unfair practices and unfair methods of competition, and that a *pro tanto* repeal of such activities where they resulted from route allocations, territorial divisions and combinations between common carriers and air carriers, was contrary to the well-established rule that *pro tanto* repeals by implication are to be found only where there is a plain repugnancy between the regulatory and antitrust laws. *Id.* at 320-23.

The dissenting opinion believed that if any accommodation between regulatory and antitrust laws were required, the primary jurisdiction doctrine rather than *pro tanto* repeal should be used. Observing that the primary jurisdiction doctrine is more flexible because it does not preclude a subsequent antitrust proceeding, the dissent continued, "this mode of resolving conflicts between court and agency avoids the practical and conceptual difficulties of pro tanto repeals by implication. Until today, the Court had never failed to invoke primary jurisdiction in preference to repeal by implication as a means of accommodating the antitrust and regulatory laws; I see no basis for deviation in the instant case from that salutary approach." *Id.* at 332. The dissenting opinion makes no reference to the cases establishing this preference for the primary jurisdiction doctrine in the antitrust cases. With the exception of the shipping cases, the preference seems rather to be to discuss the issue in terms of *pro tanto* repeal, and to conclude that either the court or the agency has exclusive jurisdiction of the activity.

[86] 374 U.S. 321 (1963).

[87] 74 Stat. 129 (1960), as amended, 12 U.S.C. § 1828(c) (1964).

[88] 374 U.S. at 354.

[89] *Compare* Keogh v. Chicago & N.W Ry., 260 U.S. 156 (1922) (railroad industry) *and* Terminal Warehouse Co. v. Pennsylvania R.R., 297 U.S. 500 (1936) (railroad industry) *and* Pan American World Airways v. United States, 371 U.S. 296 (1963) (air transportation industry), *with* United States v. Borden Co., 308 U.S. 188 (1939) (agricultural cooperative associations) *and* United States Alkali Export Ass'n v. United States, 325 U.S. 196 (1945) (trade associations) *and* United States v. Radio Corp. of

regulatory policy is much greater in the transportation industries which are subject to close control, including rate regulation, than in other industries in which there is no pervasive regulatory scheme.[90]

In the transportation industries the determination of whether the regulatory statute is applicable depends upon whether it regulates the specific activity in question and whether the agency is equipped to provide adequate relief. Thus, where the alleged conspiracy manifests itself solely in discriminatory practices adequately redressed by the Interstate Commerce Act, a private suitor's exclusive damage remedy is that granted by the regulatory statute.[91] Because a shipper's exclusive damage remedy against unreasonable rates charged by rail carriers was under the Interstate Commerce Act, his treble damage action alleging that rates approved by the ICC were fixed by a conspiracy at unreasonably high levels, was dismissed.[92] And where the acts charged as antitrust violations are "precise ingredients" of the authority granted to the agency, the exclusive remedy lies under the regulatory statute and not the antitrust laws.[93]

Where the activity transcends the scope of the regulatory statute and involves new and independent wrongs for which the agency has no remedy, it is open to the antitrust laws and may be the subject of a criminal prosecution,[94] or an injunction.[95]

America, 358 U.S. 334 (1959) (television industry) *and* Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458 (1960) (agricultural cooperative associations) *and* California v. FPC, 369 U.S. 482 (1962) (natural gas industry) *and* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (banking industry).

[90] United States v. Philadelphia Nat'l Bank, *supra* note 89, at 352; California v. FPC, *supra* note 89, at 485-86; United States v. Radio Corp. of America, *supra* note 89, at 348-50.

[91] Terminal Warehouse Co. v. Pennsylvania R.R., 297 U.S. 500, 516 (1936). The Court treated the matter in terms of the primary jurisdiction of the Interstate Commerce Commission, relying upon Keogh v. Chicago & N.W Ry., 260 U.S. 156 (1922); and United States Nav. Co. v. Cunard S.S. Co., 284 U.S. 474 (1932). However, those cases required some accommodation between the regulatory and antitrust laws because the activity involved aspects of both regulatory schemes. By contrast, the plaintiff in *Terminal Warehouse* failed to show anything more than a possible violation of the Interstate Commerce Act, and no accommodation was necessary.

[92] Keogh v. Chicago & N.W Ry., 260 U.S. 156, 161-63 (1922). Referring to the admonition of Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907), for uniformity between shippers, the Court stated that the recovery of treble damages for the exaction of a rate higher than that which would otherwise have prevailed would give the plaintiff a preference over his competitors, and that even if his competitors filed similar actions the varying awards would make uniformity impossible. 260 U.S. at 163.

[93] Pan American World Airways v. United States, 371 U.S. 296, 305-310 (1963).

[94] United States v. Pacific & Arctic Ry. & Nav. Co., 228 U.S. 87, 104-05 (1913). Although that part of the indictment charging discriminatory acts under the Interstate Commerce Act was held to be within the primary jurisdiction of the ICC, see note 42

Even where the regulatory statute exempts combinations of certain persons from the operation of the antitrust laws, the association of such persons with other groups to restrain trade, or the use of the combined power as a leverage to suppress competition, may exceed the antitrust privilege and be subject to the antitrust laws.[96] And although the regulatory scheme is pervasive, the antitrust laws are not entirely superseded but are displaced only to the extent necessary to carry out the regulatory purposes of the statute.[97]

The antitrust cases in which jurisdiction of the agency was found: the *Keogh, Terminal Warehouse* and *Pan American* cases,[98] did not apply the primary jurisdiction doctrine. In each case the court concluded that the agency rather than the court had exclusive jurisdiction of the conduct charged. Since only the agency had jurisdiction, there was no reason to stay the judicial proceedings, and a dismissal was appropriate. In the shipping cases, the primary jurisdiction doctrine has played a more important part in resolving conflicts between court and agency

Application of Primary Jurisdiction Doctrine to Shipping Cases—The Supreme Court

Rate-fixing, pooling and other preferential or cooperative working arrangements that have been approved under Section 15 of the Shipping Act are expressly immune from the antitrust laws. Violations of section 15 are subject to a penalty of not more than $1,000 for each

---

supra, the counts alleging a conspiracy to restrain and destroy competition in transportation between the U.S., the Territory of Alaska and British Columbia, were subject to the antitrust laws without prior reference to the agency.

[95] Georgia v. Pennsylvania R.R., 324 U.S. 439, 455-56 (1945). The Court held that rate-fixing combinations between rail carriers can be enjoined. It conceded that because of the decision in the *Keogh* case, the plaintiff could not recover damages resulting from the conspiracy, but ruled that since the ICC had no power to enjoin conspiracies, that remedy was available to the courts. Today railroad combinations approved by the ICC are immune from the antitrust laws under the Reed-Bulwinkle Act, 62 Stat. 472 (1948), as amended, 49 U.S.C. § 5b (1964). In the *Pan American* case, Mr. Justice Douglas, who delivered the opinion in the *Georgia* case, suggested that the *Georgia* result might be different today. Pan American World Airways v. United States, 371 U.S. 296, 306 n.11 (1963).

[96] Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458, 472 (1960); Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers, 325 U.S. 797, 808 (1945); United States v. Borden Co., 308 U.S. 188, 204-05 (1939). See Silver v. New York Stock Exch., 373 U.S. 341, 371 n.5 (1963) (dissenting opinion).

[97] Pan American World Airways v. United States, 371 U.S. 296, 305 (1963).

[98] Keogh v. Chicago & N.W Ry., 260 U.S. 156 (1922); Terminal Warehouse Co. v. Pennsylvania R.R., 297 U.S. 500 (1936); Pan American World Airways v. United States, 371 U.S. 296 (1963).

day such violation continues. Furthermore, a person injured by a violation of any section of the Shipping Act, including section 15, may recover reparations for such injury under section 22. The fundamental question in the shipping antitrust cases has been what effect the failure to obtain approval of section 15—type agreements, has on the operation of the antitrust laws. While the implementation of unapproved agreements is clearly a violation of section 15, litigation has centered on the issue of whether the exclusive remedy against such activity is an administrative proceeding under section 22, or whether the failure to obtain section 15 approval subjects the parties to the antitrust laws.

The Supreme Court first considered the application of the primary jurisdiction doctrine to the shipping industry in *United States Nav. Co. v. Cunard S.S. Co.*[99] The plaintiff, a common carrier in foreign commerce, charged that the defendant steamship companies had conspired to restrain and monopolize commerce in the trans-Atlantic trade, and sought to enjoin the defendants from continuing their anti-competitive practices. The primary complaint was the implementation of a dual-rate contract system under which a lower, contract rate was available only to shippers who patronized defendants exclusively, all other shippers paying a higher, non-contract rate. Other practices, such as coercion of shippers, rebates and trade disparagement of the plaintiff were also alleged. The district court granted a motion to dismiss on the ground that the controversy was within the exclusive jurisdiction of the Shipping Board. Judgment for the defendants was affirmed by the court of appeals and the Supreme Court. Because the Shipping Act closely paralleled the Interstate Commerce Act, the Court held that the settled construction of the Interstate Commerce Act must be applied to the Shipping Act in analogous circumstances. The Court then reviewed *Abilene*[100] and subsequent primary jurisdiction cases decided under the Interstate Commerce Act, and found that the primary jurisdiction doctrine was equally applicable to cases decided under the Shipping Act:

> The act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or

[99] 284 U.S. 474 (1932).

[100] Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

> its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal.[101]

This is the Court's most expressive pronouncement of the reasons underlying the importance of the primary jurisdiction doctrine in the regulation of the shipping industry The Court then concluded:

> A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the anti-trust laws. Compare Keogh v. Chicago & N. W R. Co. supra (260 U.S. 162, 67 L.ed. 187, 43 S. Ct. 47). The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board.[102]

The fact that the agreement entered into by the defendants was not filed with the Board did not give private parties the right to injunctive relief under the Clayton Act, the Court held, whatever the rights of the Government may be in such instances.

> If there be a failure to file an agreement as required by § 15, the board, as in the case of other violations of the act, is fully authorized by § 22, supra, to afford relief upon complaint or upon its own motion. Its orders, in that respect, as in other respects, are then, under § 31, for the first time, open to a judicial proceeding to enforce, suspend or set them aside in accordance, generally, with the rules and limitations announced by this court in respect of like orders made by the Interstate Commerce Commission.[103]

The Court dismissed the argument that the agreement was one which the Board could not lawfully approve. Approval or disapproval of a section 15 agreement was within the Board's primary jurisdiction. "Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."[104]

---

[101] 284 U.S. at 485.
[102] *Ibid.*
[103] *Id.* at 486-87.
[104] *Id.* at 487.

The result of the application of the primary jurisdiction doctrine in *Cunard* was a dismissal of the action for injunctive relief. There was no referral of any issue to the agency, and court jurisdiction instead of being stayed was ousted. Although the Court discussed the controversy in terms of the exclusive *preliminary* jurisdiction of the agency, its dismissal operated as a holding that the exclusive remedy where injunctive relief against alleged unfiled agreements is sought is that afforded by the Shipping Act, which to that extent supersedes, or repeals *pro tanto*, the antitrust laws.

Fourteen years after *Cunard*, the section 15 exemption was again discussed, in *United States v. American Union Transp., Inc.*[105] That litigation did not involve questions of primary jurisdiction. The issue was whether ocean freight forwarders were subject to the Shipping Act and thus required to comply with orders of the Commission requesting certain information pertaining to their activities. The Court reviewed the provisions of the Shipping Act in detail to show that the intimate relationship of an ocean freight forwarder to shippers and carriers gave him a unique opportunity to engage in practices declared to be unlawful by various provisions of the act, and that jurisdiction of the Commission over forwarders was essential to effectuate the policies of the act. In discussing section 15, the Court observed that the antitrust exemption applies to agreements which have been filed with and approved by the Commission, and that "it should not be necessary to emphasize, in view of the statute's plain language, that, as is indicated, the exemption arises *not* upon the mere filing of the agreement, *but only after approval* by the Commission."[106]

This dictum should be considered in the light of the *Cunard* ruling that where there is a failure to file an agreement as required

---

[105] 327 U.S. 437 (1946). In the interim, Terminal Warehouse Co. v. Pennsylvania R.R., 297 U.S. 500 (1936), was decided. See note 91 *supra*. In that treble damage action against a rail carrier and a warehouse, the Court described the *Cunard* case as having held that the right to sue under the antitrust laws was partially superseded with respect to private parties, by the adoption of the Shipping Act, which provided the exclusive remedy. *Id.* at 512-13. The same considerations which dictated the result in the *Keogh* and *Cunard* cases as to the need for a uniform system of regulation were said to apply with undiminished force to suits for damages. The Interstate Commerce Act, like the Shipping Act, said the Court, provides the means for determining whether preferences exist, and also gives a cause of action for damages for violations of its provisions. "For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive." *Id.* at 514. The Court in *Terminal Warehouse* believed the same principle applied to treble damage actions for past wrongs and suits for injunctive relief. There are, however, important distinctions between the two types of remedies, and these distinctions governed the result in subsequent cases.

[106] 327 U.S. at 447 n.8. (Italics in original.)

by section 15, the agency is authorized to grant relief under section 22 upon complaint or upon its own motion, and that a private suitor may not obtain injunctive relief. The *A.U.T* dictum would indicate that unapproved agreements are subject to the antitrust laws, although *Cunard* held to the contrary where the antitrust suit was brought by a private litigant for injunctive relief. The dictum is not necessarily inconsistent with the *Cunard* holding if one realizes that antitrust immunity may not extend to unapproved agreements, but that antitrust injunctive remedy against such agreements may be superseded by the Shipping Act. This question will be considered later.

The Supreme Court next discussed the primary jurisdiction of the agency in *Far East Conference v. United States.*[107] The Government brought an action to enjoin alleged violations of the Sherman Act by the Far East Conference and its member lines, who were engaged in the Far East trade under an agreement approved by the Shipping Board. The conference established a dual rate contract system which went beyond the scope of the approved conference agreement and failed to obtain approval of the arrangement. The district court denied defendants' motion to dismiss on the primary jurisdiction ground, holding that the immunity of section 15 does not extend to agreements beyond its scope which may violate Section 1 of the Sherman Act, and that since the Shipping Act was not a repeal *pro tanto* of the antitrust laws, the exemption, while arguably a substantive defense, may not be raised as a procedural bar to the right of the Government to prosecute the action.[108] The district court believed the *Cunard* case was distinguishable because the private litigant there had an enforceable right as well as an adequate remedy under the Shipping Act, but, the court concluded, the United States had no similar right or remedy under the act.

The Supreme Court saw no reason to depart from the *Cunard* decision, which it held to be controlling. *Cunard,* said the Court, "applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over."[109] The only real distinction between the *Cunard* and *Far East* cases was that the plaintiff in *Cunard* was a private individual rather than the Government. That difference was immaterial to the Court,

[107] 342 U.S. 570 (1952).
[108] United States v. Far East Conference, 94 F Supp. 900, 903 (D.N.J. 1951).
[109] 342 U.S. at 574.

since the same need for administrative expertise applied regardless of the plaintiff's identity The Court rejected any notion that the Government was without a remedy under the Shipping Act, stating, "it is almost frivolous to suggest that the Maritime Board would deny standing to the United States as a complainant."[110]

The Court considered whether to stay the case pending the Board's action on the dual rate contract, or to dismiss. It distinguished the conclusion in *El Dorado Terminal*,[111] where the Court ordered a stay pending the ICC's determination of the legality of a tank car leasing agreement, on the ground that *El Dorado Terminal* raised only incidentally a question for the agency's decision, whereas the controversy before it involved questions within the general scope of the Board's jurisdiction. Since an order of the Board would be subject to judicial review, and, if favorable to the Government, could be enforced by a district court under Section 29 of the Shipping Act, the Court concluded that no purpose would be served by staying the action, noting that a similar action could be instituted later if appropriate.

Mr. Justice Douglas, in a dissenting opinion concurred in by Mr. Justice Black, stated that if the dual rate contract system had been approved under section 15, the Sherman Act exemption would apply, "but that exemption from the Sherman Act can be acquired only in the manner prescribed by § 15. Here no effort was made to obtain it. Hence the petitioners are at large, subject to all of the restraints of the Sherman Act."[112]

While *Cunard* left unanswered the question of the Government's right to injunctive relief against the implementation of unapproved agreements, the *Far East Conference* case made it clear that, prior to an administrative determination of the approvability of such agreement, all suitors, public or private, are foreclosed from injunctive relief.

The way in which the Court disposed of the litigation in the *Far East Conference* case presents some procedural uncertainties. The reason it ordered a dismissal rather than a stay was as follows: the question for initial administrative decision, the approvability of the agreement, involved questions within the general scope of the Board's jurisdiction, rather than an "incidental" administrative question as in the *El Dorado Terminal* case where a stay was ordered. Since an order of the Board disapproving the agreement and ordering its implemen-

---

110 *Id.* at 576.

111 General Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940).

112 342 U.S. at 578.

tation discontinued could be enforced, if necessary, under section 29 by a district court on the application of the Attorney General, there was no need to stay the action. If the Board approved the prospective implementation of the agreement, the Government would of course have the right to seek judicial review This would indicate that the exclusive injunctive remedy against the implementation of an unapproved agreement is a section 22 complaint, and upon a determination by the agency that the agreement is unapprovable, a section 29 enforcement proceeding in the district court, if necessary However, the Court also stated that a similar suit could be filed later, if appropriate. The purpose of such a subsequent suit was not disclosed, and, in view of the administrative complaint and judicial enforcement procedure authorized by sections 22 and 29, or in the alternative judicial review, there seems to be none, unless it is to provide an alternative to a section 29 enforcement proceeding.

Next came *Federal Maritime Bd. v. Isbrandtsen Co.*,[113] which was a judicial proceeding to review the lawfulness of an order of the Board, rather than a suit alleging violations of the antitrust laws. The primary jurisdiction doctrine was not directly involved because the agency had made its determination, and the issue was whether the determination was correct. However, the Court was faced with the argument that the *Cunard* and *Far East Conference* decisions dictated the result, and its discussion of those cases amplifies their meaning and illustrates the Court's conception of the proper functions of court and Commission.

Isbrandtsen, like the *Cunard* and *Far East Conference* cases, involved the legality of a dual rate contract system. As a result of prior litigation,[114] the Board's approval of the dual rate contract system of the Japan-Atlantic and Gulf Freight Conference, without a hearing, was set aside, and the Board was ordered to consider the approvability of the conference's dual rate contract under the standards of section 15. Subsequently the Board conducted hearings and approved the agreement. The record before the Board showed that the dual rate system was proposed by the conference for use in a rate war being waged between the conference lines and Isbrandtsen, a non-conference carrier.

On Isbrandtsen's petition to review the approval of the dual rate agreement, the court of appeals set aside the Board's order, holding

---

[113] 356 U.S. 481 (1958).

[114] Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954).

that the dual rate agreement violated section 14 Third of the Shipping Act, which prohibits common carriers from retaliating against shippers by resorting to any discriminating or unfair methods.[115] The Supreme Court affirmed. It held that dual rate contracts of the type under consideration were not similar to the "requirements contracts" that were discussed by the Alexander Committee and not specifically outlawed by the Shipping Act. Unlike ordinary requirements contracts, dual rate agreements existing in the shipping industry gave no guarantee of services and rates for any substantial period, and contained substantial liquidated damage provisions which resembled the objectionable features of the deferred rebate system prohibited by section 14 First of the act. The Court concluded that the general provisions of section 14 Third were intended by Congress to outlaw practices in addition to those specifically prohibited elsewhere in section 14, when such practices are used to stifle the competition of independent carriers.[116] Making use of the Board's finding that the conference's dual rate contract was instituted to suppress competition from Isbrandtsen, the Court concluded that the agreement was a device made unlawful by section 14 Third,[117] and affirmed the decision of the court of appeals which set aside the Board's approval of the agreement.

The failure of the Court in the *Cunard* and *Far East Conference* cases to find the dual rate contracts in those cases to be unlawful under section 14 Third foreclosed, according to the argument of the conference and the Board, which had intervened, any determination that the disputed contract was illegal under that section. The Court disagreed, stating that the *Cunard* and *Far East Conference* cases, "while holding that the Board had primary jurisdiction to hear the case in the first instance, did not signify that the statute left the Board free to approve or disapprove the agreements under attack."[118] The referral to the Board in those cases was a recognition that the agency's specialized knowledge and its informed findings would be of valuable assistance to the court as a preliminary to the court's ultimate task of assessing the legality of the practices:

> Thus the Court's action in *Cunard* and *Far East Conference* is to be taken as a deferral of what might come to be the ultimate question —the construction of § 14 Third—rather than an implicit holding that the Board could properly approve the practices there involved. The holding that the Board had primary jurisdiction, in short, was a de-

[115] Isbrandtsen Co. v. United States, 239 F.2d 933, 937-38 (D.C. Cir. 1956).
[116] 356 U.S. at 495.
[117] *Id.* at 500.
[118] *Id.* at 498.

> vice to prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the statute as applied to those particular circumstances.[119]

The Court stated that since section 14 Third invalidated dual rate contracts only when they are employed as predatory devices, the Court in the *Cunard* and *Far East Conference* cases could not, without such a finding, make a determination under section 14 Third. Those decisions did not, therefore, foreclose a ruling that section 14 Third prohibited the contract in a case in which the Board had made the necessary preliminary findings.

Mr. Justice Frankfurter, who delivered the opinion of the Court in the *Far East Conference* case, dissented in an opinion concurred in by Mr. Justice Burton. The dissent believed the Alexander Committee was aware of the existence and purpose of dual rate contract systems. The failure to prohibit such practices specifically, while outlawing deferred rebates, fighting ships and retaliatory actions, proved, according to the dissent, that Congress did not wish to prohibit the dual rate contract system.

The dissenting opinion believed that the conclusion of the majority was contrary to the decisions in *Cunard* and *Far East Conference.* In both cases, Mr. Justice Frankfurter noted, the plaintiffs alleged that the dual rate contract system was illegal per se under section 14 and that the Board was without power to approve it, and in both cases it was alleged that the purpose of dual rate contracts was to eliminate competition. While the immediate issue in those cases was the applicability of the primary jurisdiction principle to a proceedng involving the legality of the dual rate contract system, the conclusion that the Board, rather than the courts, must adjudicate the complaints against the contracts constituted, in Mr. Justice Frankfurter's view, "the plainest possible recognition that it was for the Board to approve or disapprove the dual-rate contract system complained of, and, therefore, that the practice was not illegal as a matter of law—that is, by virtue of a statutory condemnation."[120] To refer the approvability of dual rate contracts to the Board and then to overturn the Board's approval of such agreements, transformed the doctrine of primary jurisdiction, in the opinion of Mr. Justice Frankfurter, into an empty ritual.

> Surely it is a form of playfulness to make resort to the Board a prerequisite when the judicial determination of law could have been made precisely as though there had been no proceeding before the

[119] *Id.* at 498-99.
[120] *Id.* at 522.

> Board. This is to make a mockery of the doctrine of primary jurisdiction and to interpret the decisions in the Cunard and Far East Conference cases as utterly wasteful futilities.[121]

Mr. Justice Harlan wrote a separate dissenting opinion, in which he agreed with Mr. Justice Frankfurter that the subject dual rate contract did not violate section 14 Third, but did not subscribe to the view that the *Cunard* and *Far East Conference* cases decided, sub silentio, the question of the legality of such agreements under section 14 Third.[122]

Where an administrative determination is necessary to gather and appraise the facts for a better-informed judicial definition, the primary jurisdiction doctrine provides a means for obtaining such an appraisal. However, the agency's definition of the legal consequences of the facts in controversy is a judicial rather than an administrative function. The ultimate result may be, as in the *Isbrandtsen* case, that the facts marshaled by the agency show that the agency's analysis of their legal consequences was incorrect. The utility of the primary jurisdiction doctrine is not restricted thereby, because the referral of issues involving complex and intricate technical facts to the administrative agency does not constitute pre-approval of the agency's conclusions based upon such facts, as long as in the review process due regard is given to the agency's specialized competence.

The *Cunard* and *Far East Conference* cases foreclosed both private litigants and the Government from obtaining injunctive relief under the antitrust laws without preliminary resort to the agency for a determination of the legality of the conduct under section 15. Those decisions did not, however, define the extent to which the antitrust laws were displaced by the Shipping Act. Whether suits based upon past conduct, such as treble damage actions, were barred was also left unanswered. Decisions of the lower courts were conflicting.[123] The agency entrusted with the duty of approving or disapproving section 15 agreements was of the opinion that such anticompetitive agreements were intended by Congress, and by the *Cunard* and *Far East Conference* decisions, to be immune from the antitrust laws even

---

[121] *Id.* at 519.

[122] *Id.* at 524. The *Isbrandtsen* decision was followed by legislation to perpetuate existing dual rate contract systems until Congress had an opportunity to investigate such arrangements. The investigation resulted in the passage of Pub. L. No. 87-346 (approved October 3, 1961), 75 Stat. 762 (1961), 46 U.S.C. § 813a (1964), which added § 14b to the Shipping Act, authorizing the Commission to approve dual rate contracts pursuant to the standards of that section. See note 14 *supra.*

[123] See note 157 *infra* and accompanying text.

though unapproved because, the Board believed, section 15 superseded the antitrust laws, and the sole consequences of a failure to obtain approval of a section 15-type agreement were penalty actions as provided in section 15 and reparations proceedings under section 22.[124]

The answers came with *Carnation Co. v. Pacific Westbound Conference*,[125] a treble damage action under the Clayton Act against the Pacific Westbound Conference, the Far East Conference, and their respective member lines, charging violations of Sections 1 and 2 of the Sherman Act. Each of the two conferences operated under an agreement approved by the agency, and, in addition, an inter-conference agreement, providing for the joint fixing of rates by both conferences, had also been approved. The complaint alleged that the defendants had entered into a secret rate-fixing agreement which went beyond the scope of the approved agreements and that the activities under the secret agreement were not exempt from the antitrust laws.

Prior to the filing of the treble damage action, the Board instituted an investigation of the approved joint agreement between the two conferences to determine whether it was a true and complete agreement of the parties, and whether it was being carried out in a lawful manner under the Shipping Act. Carnation intervened in the agency proceeding. The complaint alleged that at the hearing in the administrative proceeding, plaintiff learned of the existence of the unapproved agreement, and thereupon filed the treble damage action. The motion of the defendants to dismiss, on the ground that the Shipping Act provided plaintiff's exclusive remedy, was granted and the court

---

[124] A witness for the Board testified in *Hearings Before Antitrust Subcommittee of the House Committee on the Judiciary on Monopoly Problems in Regulated Industries: Ocean Freight Industry*, 86th Cong., 1st Sess., ser. 14, pt. 1, vol. 1, at 30 (1959) [hereinafter cited as CELLER HEARINGS], that an agreement, whether or not approved, is not amenable to prosecution under the antitrust laws if it is of the type contemplated by § 15. According to the witness, the Board, when it approves an agreement, does not thereby confer exemption. The exemption is there by operation of law, because of the subject matter of the agreement. The passage from the *Cunard* opinion, quoted in the text accompanying note 103 *supra*, was cited as support for this theory. Legal opinions were furnished the Celler Committee by the Federal Maritime Board, concluding that unapproved agreements were exempt from the antitrust laws, and by the Justice Department arriving at a contrary conclusion. CELLER HEARINGS, pt. 1, vol. 1, at 923-38. The Celler Committee disagreed with the Board's conclusion, and added that if the Board's position were in fact correct, the law should be changed. CELLER REPORT at 332-33.

[125] 383 U.S. 213 (1966) (amended opinion). The Court's opinion was delivered on February 28, 1966, 34 U.S.L. WEEK 4181, but was amended on March 7, 1966. The official report contains the amended opinion. For discussion of the reason for the amendments, see text accompanying notes 138-40 *infra*.

of appeals affirmed.[126] The court of appeals held that the *Cunard* and *Far East Conference* cases were controlling, and the fact the action was for treble damages rather than injunctive relief did not change the result. The rationale of the *Cunard* and *Far East Conference* cases, said the court of appeals, was as applicable to a treble damage suit as an injunction action because in both cases preliminary resort to the Commission is necessary "to secure the uniformity of application of the Congressional scheme, and in order to procure resolution of the facts by a body having an adequate appreciation of the intricate business of transportation by sea."[127] The court found authority for its conclusion in *American Union Transp. v. River Plate & Brazil Conferences*,[128] which held that the *Cunard* and *Far East Conference* cases required a dismissal of an action for treble damages based upon the implementation of an unapproved agreement.

The court of appeals considered whether a stay or a dismissal was appropriate. It concluded that "the only possible reason for allowing the action to be retained on the district court docket would be to avoid a claim that antitrust action was barred by the statute of limitations. Since we hold that such an action cannot at this date be maintained, this reason is not applicable here."[129]

The Supreme Court reversed in a unanimous opinion delivered by the Chief Justice. The Court concluded first that the express exemption of section 15 covers approved agreements which are lawful under that section, but not the implementation of unapproved agreements which is specifically prohibited by section 15. Drawing an analogy from the *Borden*[130] interpretation of a similar immunity provision of the Agricultural Marketing Agreement Act, the Court declared that "the creation of an antitrust exemption for rate-making activities which are lawful under the Shipping Act implies that unlawful rate-making activities are not exempt."[131] Having found that the specific exemption of section 15 did not apply, the Court considered the defendants' contention that the terms and legislative history of the

[126] Carnation Co. v. Pacific Westbound Conference, 336 F.2d 650 (9th Cir. 1964).

[127] *Id.* at 655.

[128] 126 F Supp. 91 (S.D.N.Y. 1954), *affirmed per curiam on opinion below*, 222 F.2d 369 (2d Cir. 1955). See note 157 *infra*.

[129] 336 F.2d at 667 n.32. At the time the court of appeals rendered its decision the Commission's investigation had not concluded, and there was no administrative determination that the conferences were acting beyond the scope of their approved agreement. By the time the case was before the Supreme Court, the agency had determined that the approved agreement did not cover the activities of the conferences.

[130] United States v. Borden Co., 308 U.S. 188, 201 (1939).

[131] 383 U.S. at 216-17.

Shipping Act demonstrate a legislative purpose to repeal the antitrust laws in their application to the shipping industry The Court rejected this argument, relying on its statement in the *Philadelphia Nat'l Bank* case that "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."[132] The Court found nothing in the legislative history of the Shipping Act to show a congressional desire that the antitrust exemption be broader than that specifically provided in section 15.

The defendants also argued that treble damage awards to shippers are rebates and that unequal rebates would result from the varying awards which would inevitably be granted by different courts and juries, thus making it impossible to maintain equality between shippers. This theory, while persuasive in the *Keogh* case[133] which involved rate-fixing under the Interstate Commerce Act, was rejected.

> We believe that Congress was concerned with assuring equality of treatment by the conferences, not with equality of treatment by juries in collateral proceedings. There is no reason to believe that Congress would want to deprive all shippers of their right to treble damages merely to assure that some shippers do not obtain more generous awards than others.[134]

The Court then discussed the *Cunard* and *Far East Conference* cases, and held those decisions were not controlling. "Those cases merely hold that courts must refrain from imposing antitrust sanctions for activities of debatable legality under the Shipping Act in order to avoid the possibility of conflict between the courts and the Commission."[135] The Court explained that the *Cunard* and *Far East Conference* situations involved two sources of possible conflict between the courts and the agency First, the plaintiffs in *Cunard* and *Far East Conference* sought to enjoin the alleged implementation of unapproved agreements. Since the agency had not passed on the conduct, it was possible that the district court might conclude that the activities were in furtherance of an unapproved agreement and thus subject to the antitrust laws, while the agency might in a later proceeding determine that the same conduct came within the scope of an approved agreement and was thus exempt from the antitrust laws. Second, if the district court in the *Cunard* and *Far East Conference*

[132] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963), quoted in 383 U.S. at 217-18.

[133] Keogh v. Chicago & N.W Ry., 260 U.S. 156, 163 (1922).

[134] 383 U.S. at 219 n.3.

[135] *Id.* at 220.

cases enjoined the activities, the Commission, even if it agreed that the conduct was not within the scope of an approved agreement, might be hampered if it decided to approve the prospective implementation of the agreement. These considerations did not, however, require that the shipping industry be totally immune from the antitrust laws. Instead, said the Court: "The Far East and Cunard principles permit courts to subject activities which are clearly unlawful under the Shipping Act to antitrust sanctions so long as the courts refrain from taking action which might interfere with the Commission's exercise of its lawful powers."[136] The award of treble damages for past conduct would not interfere with any future action of the Commission. Since the Commission has no power to approve agreements retroactively, "the Far East and Cunard principles only preclude courts from awarding treble damages when the defendants' conduct is arguably lawful under the Shipping Act."[137]

In *Carnation*, an action for treble damages rather than injunctive relief, the risk of conflict between court and agency jurisdiction lay in the danger that the court might find the defendants' activities constituted the implementation of an unapproved agreement, while the agency might later conclude the conduct was within the scope of an approved agreement. The Supreme Court's decision, as originally written, found that no such risk existed because the Commission had finished its investigation of the joint agreement between the two defendant conferences, and had concluded that the conduct complained of was not within the scope of the agreement, and furthermore that the time for judicial review had expired. The Court in its original opinion concluded "thus, there can no longer be any doubt that respondents' activities violated the Shipping Act and are not arguably exempt from antitrust regulation."[138] However, it was subsequently called to the Court's attention that the Commission had amended its decision, thereby reopening the time for judicial review, and that the conferences had filed an appeal from the decision. Because of the pending appeal, defendants' conduct was still "arguably" exempt from antitrust regulation. The pending appeal from the Commission's determination did not alter the substance of the Court's decision. The opinion was amended to reflect the pending appeal, and, as in the original decision, the Court reversed and remanded the case to the district court, but instead of instructing the district court to proceed

[136] *Id.* at 221.
[137] *Id.* at 222.
[138] 34 U.S.L. WEEK 4181, 4183 (U.S. February 28, 1966).

with a determination of the antitrust issues as in the original opinion, the Court remanded "with instructions to stay the action pending the final outcome of the Shipping Act proceedings and then to proceed in a manner consistent with this opinion."[139]

The lack of finality of the Commission proceedings thus required a stay of the judicial proceeding. This result was foreshadowed in the court's original opinion in which it observed, at that time by way of dictum, that even if the activities complained of were arguably exempt, it was not appropriate for the court of appeals to dismiss the action, because "a treble damage action for past conduct cannot be easily reinstituted at a later time. Such claims are subject to the Statute of Limitations and are likely to be barred by the time the Commission acts. Therefore, we believe that the Court of Appeals should have stayed the action instead of dismissing it."[140]

By staying the antitrust proceedings until the final outcome of the agency proceeding, the Court applied the primary jurisdiction doctrine to prevent any conflict which might have resulted had the Commission's determination been set aside on review and a final decision rendered by the agency that the conduct was within the scope of the approved agreement. *Pro tanto* repeal of the antitrust laws was inappropriate. The specific exemption of section 15 indicated a legislative intent not to provide broader immunity, and, unlike the situation in the *Pan American* case, a treble damage action for past and completed conduct implementing an unapproved section 15-type agreement does not involve "precise ingredients" of the agency's authority in approving or disapproving agreements under section 15.[141]

However, an action for injunctive relief stands on different ground. It is clear from the *Cunard* and *Far East Conference* opinions that the power to approve or disapprove rate-fixing agreements is exclusively that of the Commission, subject to judicial review[142] The *Carnation* decision did not change that conclusion. Interim injunctive relief restraining activity not arguably lawful until the plaintiff has had an opportunity to obtain relief from the Commission would not infringe upon the Commission's freedom to pass on such

[139] 383 U.S. at 224 (amended opinion). The appeal filed by the conferences has not yet been decided. Pacific Westbound Conference v. United States, *appeal docketed*, No. 23506, 5th Cir., March 17, 1966. The appeal was transferred from the Court of Appeals for the Ninth Circuit where it had commenced on December 30, 1965.

[140] 34 U.S.L. WEEK 4181, 4183 (U.S. February 28, 1966).

[141] *Cf.* Pan American World Airways v. United States, 371 U.S. 296, 305 (1963).

[142] United States Nav. Co. v. Cunard S.S. Co., 284 U.S. 474, 485 (1932); *accord*, Far East Conference v. United States, 342 U.S. 570, 573-74 (1952).

conduct.[143] A permanent injunction would have that result because, assuming the conduct is not even arguably lawful, a permanent injunction would interfere with an agency determination that the activity should be approved prospectively The Shipping Act thus appears to repeal *pro tanto* the right, otherwise available under the antitrust laws, to enjoin permanently rate-fixing and other anti-competitive agreements. An action for such relief involves "precise ingredients" of the Commission's authority to approve, disapprove or modify agreements contemplated by section 15. In place of a judicial proceeding to permanently enjoin the activity, the Shipping Act offers the right of a section 22 complaint proceeding followed by judicial review if the conduct is approved, or a section 29 enforcement action in a district court if the Commission disapproves the conduct and its order to discontinue the activity is ignored. This administrative procedure would leave intact an injured party's right under the *Carnation* decision to recover damages for any injury resulting from the implementation of an agreement without prior Commission approval.

Carnation makes it clear that despite the jurisdiction of the Commission to award reparations for any violation of the act, including violations of section 15, rate-fixing activities pursuant to unapproved agreements are not exempt from the antitrust laws. One injured by such activities may seek reparations from the Commission or may institute an antitrust action for treble damages, because "the rights which petitioner claims under the antitrust laws are entirely collateral to those which petitioner might have sought under the Shipping Act. This does not suggest that petitioner might have sought recovery under both, but petitioner did have its choice."[144]

In treble damage actions for conduct allegedly constituting im-

---

[143] See text accompanying notes 211-215 *infra*, for discussion of judicial aid to maintain the status quo pending an administrative determination. In Pennsylvania Motor Truck Ass'n v. Port of Philadelphia Marine Terminal Ass'n, 183 F Supp. 910 (E.D. Pa. 1960), where the court enjoined the enforcement of a tariff provision pending the agency's determination of its lawfulness, the *Cunard* and *Far East Conference* cases were distinguished on the ground that they held district courts have no jurisdiction in antitrust cases to determine the legality of agreements. "Such issues are within the exclusive competence and primary jurisdiction of the expert administrative agency—the Federal Maritime Board. But, in those cases there was no question raised as to the propriety of the court in issuing an injunction to hold the matter in status quo." *Id.* at 915-16. If, however, the conduct is debatably lawful under § 15 even interim injunctive relief may interfere with a determination that the conduct was within the scope of an approved agreement. Interim injunctive relief would involve no risk of conflict with the agency's jurisdiction only if limited to activity not arguably lawful, and in such instances may offer an appropriate solution until the agency has made its determination. Approval by the agency of such activity prospectively will not be affected by such interim relief.

[144] Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 224 (1966).

plementation of unapproved agreements, the primary jurisdiction doctrine applies when the conduct is arguably lawful under the Shipping Act. If the defendants' activity is arguably within the scope of an approved agreement, the district court should stay the action until the Commission exercises its exclusive right to make the initial factual determination. If the ultimate determination of the administrative proceeding is that the conduct is within the scope of an approved agreement, the activity is exempt from the antitrust laws, and the treble damage action should be dismissed. If the Commission concludes that the activity is outside the scope of filed agreements, the court may proceed with the antitrust action free of any risk of possible conflict with the Commission's jurisdiction.

The lower court cases have discussed the primary jurisdiction doctrine in contexts not yet considered by the Supreme Court. A review of those decisions provides a more comprehensive understanding of the doctrine's place in shipping regulation.

Application of the Doctrine to Shipping Cases—The Lower Courts

General Principles

Before considering how the lower courts have applied the primary jurisdiction doctrine in the antitrust and other areas, there are some general standards announced by the courts which should be discussed at this point.

The primary jurisdiction doctrine has been applied to threatened as well as actual violations of the Shipping Act.[145] The doctrine may be invoked against a plaintiff who is not subject to the Shipping Act.[146] Since "any person" may file a complaint with the Commission under section 22, it is difficult to conceive of a class of persons who could avoid the application of the doctrine on the ground that they are disqualified from section 22 proceedings.[147]

The fact that the Commission has rendered a decision in a similar

[145] Wisconsin & Mich. Transp. Co. v. Pere Marquette Line Steamers, 210 Wis. 391, 396, 245 N.W 671, 673 (1932).

[146] Rivoli Trucking Corp. v. New York Shipping Ass'n, 167 F Supp. 940, 942 (S.D.N.Y. 1956), *motion for leave to file amended and supplemental complaint denied*, 167 F Supp. 943 (S.D.N.Y. 1957). A trucker, although not subject to the Shipping Act, may bring a complaint proceeding under § 22, and his claim was therefore referable to the agency.

[147] *Cf.* Far East Conference v. United States, 342 U.S. 570, 576 (1952), where the Government's defense against the application of the doctrine on the ground it was not a "person" eligible to file a complaint with the agency was met by the response that it was "almost frivolous" to suggest that the agency would deny standing to the Government as a complainant.

case does not abrogate the need for prior resort to the agency, since what the Commission may have done under similar circumstances might not control the disposition of the case under consideration.[148]

The failure of a party to seek an administrative determination of a question prior to the filing of suit against him does not preclude him from asserting the doctrine to refer the question to the agency.[149]

The Antitrust Cases

In some instances the courts have held that where the acts complained of in an antitrust case fall within the scope of the Shipping Act, that showing alone is sufficient to invoke the primary jurisdiction doctrine. This was the approach taken in *Rivoli Trucking Corp. v. New York Shipping Ass'n*,[150] *Maldonado v. Sea-Land Serv., Inc.*,[151] and *Carlos Crespo Trucking Serv., Inc. v. Sea-Land Serv., Inc.*[152]

---

[148] Wisconsin & Mich. Transp. Co. v. Pere Marquette Line Steamers, 67 F.2d 937 (7th Cir. 1933). The court relied on the holding in the *Cunard* case that what the agency may have done in another case under different circumstances should not govern the resolution of the controversy in issue. *Id.* at 938

[149] See Port of Bandon v. Oliver J. Olson & Co., 175 F Supp. 736, 742 (D. Ore. 1959). The fact that the respondent failed to file a complaint with the agency attacking the lawfulness of a tariff charge did not prevent him from obtaining a stay of a suit to collect unpaid charges under the tariff. The reason given for the court's conclusion was that it is not the filing of an unlawful tariff that gives grounds for affirmative relief, but its attempted enforcement. The court appears to say that any administrative proceeding by respondent prior to the attempted enforcement of the tariff would have been premature. However, even where the party seeking to invoke the doctrine could have instituted an administrative proceeding, his failure to do so should not foreclose him from obtaining a referral of appropriate questions raised by way of defense. See United States v. Western Pac. R.R., 352 U.S. 59, 73-74 (1956). In Bird v. S.S. Fortuna, 262 F Supp. 24 (D. Mass. 1966), the court said "the doctrine of primary jurisdiction is not subject to waiver and a court should invoke the doctrine, if applicable, on its own motion." *Id.* at 26.

[150] 167 F Supp. 940 (S.D.N.Y. 1956), *motion for leave to file amended and supplemental complaint denied*, 167 F Supp. 943 (S.D.N.Y. 1957). In this treble damage action the plaintiff alleged that, as the result of a conspiracy among the defendants, it was locked out of defendants' terminals and was subjected to demurrage penalties and other unethical trade practices and wrongful conduct of the defendants. The court held that if these charges were true they would constitute undue or unreasonable prejudice under § 16 and unjust and unreasonable practices under § 17, over which the agency has primary jurisdiction. The court therefore granted defendants' motion to dismiss.

[151] 240 F Supp. 581 (D. Puerto Rico 1965). The court granted a motion to dismiss this civil action under the Sherman Act holding, without any discussion of the underlying issues, that the Shipping Act " 'stands in the way' of this Court's jurisdiction to enforce the provisions of the Sherman Anti-Trust Act, which the plaintiffs invoke against the defendants in the complaint, and that, therefore, I must decline jurisdiction in favor of the primary jurisdiction of the Federal Maritime Board." *Id.* at 582.

[152] 260 F Supp. 858 (D. Puerto Rico 1966). The same court in the *Maldonado* case reached the same conclusion, but stayed rather than dismissed because of *Carnation.*

There was no discussion in these cases of whether the alleged concerted action of the defendants was pursuant to an unfiled section 15 agreement. This was an important omission, because, if the conduct of the defendants was covered by an approved section 15 agreement, the defendants' acts would have antitrust immunity, but if the defendants were acting under an unapproved agreement, the antitrust laws apply, as the *Carnation* decision made clear, and it would be error to dismiss the treble damage action. Where the complaint charges antitrust violations, a determination must therefore be made whether the antitrust exemption of the Shipping Act is applicable. If this cannot be done without reference to the Commission, the primary jurisdiction doctrine should be applied to accomplish that result. But the requirements for invoking the doctrine are not met merely because some of the acts charged fall within the scope of the Shipping Act. They may do so and also violate the antitrust laws. However, even when the activity cannot be immunized the doctrine may still be applicable if there are issues within the specialized competence of the agency which may have an important bearing on the outcome of the antitrust proceeding.[153]

If the acts charged in the antitrust proceeding are beyond the scope of the Shipping Act, the primary jurisdiction doctrine is not

---

[153] Maddock & Miller, Inc. v. United States Lines, 365 F.2d 98, 102 (2d Cir. 1966). This was a treble damage action in which it was alleged that the shipper defendants threatened defendant United States Lines that they would ship via other carriers if United States Lines did not purchase its chinaware requirements from one of the defendants, and that as a result, United States Lines agreed to do so, thereby paying a deferred rebate in violation of § 14 of the Shipping Act. It was contended that such acts constituted a conspiracy in restraint of trade under the Sherman Act. Separate counts alleged the receipt of a rebate by defendant U.S. Lines and a conspiracy under the Sherman Act against all defendants. The acceptance of the rebate was alleged as part of the conspiracy. The court concluded that whether the payment constituted a rebate was for the Commission to decide, and also referred the Sherman Act count to the Commission even though the alleged activity could not be immunized. The court held: "Because it does not appear that this agreement could come under any protective umbrella of the Maritime Commission, a finding by a district court that the agreement violated the Sherman Act would not seem to 'interfere with the Commission's exercise of its lawful powers,' Carnation Co. v. Pacific Westbound Conference, *supra*, if that were to be interpreted narrowly.

"But reference to an administrative agency is not restricted to situations when the agency has the power to immunize, as the subsequent history of the *Far East* litigation demonstrated when the court held the agency was without power to immunize the dual system of rates under attack. Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 78 S. Ct. 851, 2 L. Ed. 2d 926 (1958) Whether the agreement to change suppliers constituted a rebate is not dispositive of the Sherman Act question but it may have an important bearing on the issue." *Ibid.*

applicable.[154] Where the conspiracy was between a steamship company and an air carrier not subject to the Commission's jurisdiction, the doctrine was held inapplicable.[155] In controversies involving alleged multi-party conspiracies, the doctrine does not apply if the concerted activity extends beyond that contemplated by the Shipping Act and includes persons not subject to the act.[156]

[154] Hawaiian Airlines v. Trans-Pacific Airlines, 78 F Supp. 1, 8 (D. Hawaii 1948). The court held that a complaint charging a conspiracy between an air carrier and a water carrier to monopolize transportation between the Hawaiian Islands alleged matters over which neither the Federal Maritime Commission nor the Civil Aeronautics Board had jurisdiction. Relying on Georgia v. Pennsylvania R.R., 324 U.S. 439, 456-60 (1945), the court held the doctrine of primary jurisdiction to be inapplicable in such circumstances.

[155] Hawaiian Airlines v. Trans-Pacific Airlines, *supra* note 154, at 8. The court distinguished the controversy before it from that of the *Cunard* case where all of the parties were subject to the jurisdiction of the Commission and the agency had power to see that its orders were enforced, stating, "the Maritime Commission lacks authority over the control of Hawaiian by Inter-Island as § 15 of the Shipping Act, 46 U.S.C.A. § 814 does not affect agreements between water carriers and air carriers, as air carriers are not persons subject to that law." *Id.* at 4.

[156] The Federal Maritime Commission and its predecessors have found that agreements between a person subject to the act and one who is not cannot be approved under § 15. In the Matter of Wharfage Charges and Practices at Boston, Massachusetts, 2 U.S.M.C. 245, 251 (Dkt. No. 481, 1940); United States Gulf-Atlantic & India, Ceylon and Burma Conference (Agreement No. 7620), 2 U.S.M.C. 749, 754 (Dkt. No. 635, 1945). In Grace Line, Inc. v. Skips A/S Viking Line, 7 F.M.C. 432, 449 (Dkt. Nos. 946, 950 & 953, 1962), the Commission stated: "Section 15 was enacted to subject anticompetitive agreements between those engaged in specified maritime enterprises to the scrutiny of a regulatory agency, and to authorize that agency under stated conditions to exempt such agreements from the operation of the antitrust laws, and this it does. This agreement is not between parties specified by Section 15. Therefore Section 15 does not require that it be filed with and approved by the Commission nor can the Commission, by approval, exempt it from the operation of the antitrust laws." In a pre-*Cunard* decision, Buyer v. Guillan, 271 Fed. 65 (2d Cir. 1921), an action by a shipper against a carrier, its agents and unions, alleging a conspiracy under the Sherman Act to discriminate against plaintiff's goods, the court found an unlawful combination, and enjoined the activities without mentioning primary jurisdiction. The doctrine has, however, been applied where some of the parties were not subject to the Shipping Act. This was the result in New York Lumber Trade Ass'n v. Lacey, 245 App. Div. 262, 281 N.Y.S. 647 (App. Div.), *aff'd per curiam*, 269 N.Y. 595, 199 N.E. 688 (1935), *modified*, 269 N.Y. 677, 200 N.E. 54, *cert. denied*, 298 U.S. 684 (1936) and United States v. Pacific Lumber Co., No. 34859, N.D. Cal., July 31, 1956 (unreported opinion). The court in the *Lacey* case, decided after *Cunard*, applied the primary jurisdiction doctrine to the legality of certain terminal practices allegedly resulting from a conspiracy between carriers, unions, agents and stevedores, although some members of the conspiracy were not subject to the Shipping Act. The reasoning of the court was that if an order of the agency aimed at the carriers were not adequate to dissolve the conspiracy, relief could be obtained from a district court in an action to enforce the Board's order under § 29 by including in such enforcement proceedings all persons conspiring with the carriers. 281 N.Y.S. at 662. The *Pacific Lumber* case was an action by the Government under

Section 15 Agreements

Prior to the decision in the *Carnation* case, the lower courts, while agreeing that the implementation of an unapproved section 15 agreement was unlawful under the Shipping Act, were divided on the question of whether the failure to obtain approval subjected the parties to the antitrust laws.[157] The matter has been settled by the *Carnation* holding that the implementation of rate-making agreements

the Sherman Act to enjoin a conspiracy to restrain trade in the export of lumber. Despite the fact that some of the defendants were not subject to the act, the court granted a motion to dismiss, holding that the *Far East Conference* case was dispositive. However, antitrust immunity applies only when the combination is acting under an agreement approved by the Commission. The courts in the *Lacey* and *Pacific Lumber* cases did not consider the question of immunity or lack of it, deciding merely that the acts were of the type which fell within the terms of the Shipping Act and, concluding that since they did, the doctrine applied.

However, the Court in *Carnation* stated "the *Far East* and *Cunard* principles permit courts to subject activities which are clearly unlawful under the Shipping Act to antitrust sanctions so long as the courts refrain from taking action which might interfere with the Commission's exercise of its lawful powers." Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 221 (1966). It would seem that antitrust sanctions are applicable to concerted activity beyond the scope of the Shipping Act with persons not subject to the act because such conduct cannot be approved by the Commission. Activities pursuant to such combinations cannot, therefore, be immunized and there is no danger of interfering with any future action of the Commission. *Cf.* United States v. Borden Co., 308 U.S. 188, 204-05 (1939), where the authorization granted to agricultural producers by § 1 of the Capper-Volstead Act, 42 Stat. 388 (1922), 7 U.S.C. § 291 (1964), to associate to market their goods, did not give such persons the right to combine with agricultural distributors and labor officials to restrain trade.

The fact that one or more of the alleged conspirators is not subject to the Shipping Act should not, of itself, preclude the application of the primary jurisdiction doctrine because the activity may still be within the scope of an approved agreement. Conferences, for example, are permitted by their approved § 15 agreements between the member lines to deal with persons such as shippers and travel agents who are not subject to the Shipping Act. Legitimate business activity between the conference members and shippers or travel agents is therefore permitted by the conference agreement, and the doctrine should apply to conduct arguably within the scope of such agreements. However, if the conference members enter into agreements directly with the shippers or travel agents (other than dual rate contracts with shippers which are expressly permitted by § 14b), and combine with them to restrain or monopolize trade the activity ceases to become arguably immune and the doctrine should be inapplicable.

[157] *Compare* Isbrandtsen Co. v. United States, 211 F.2d 51, 57 (D.C. Cir.), *cert. denied sub. nom,* Japan-Atlantic & Gulf Conference v. United States, 347 U.S. 990 (1954) (dual rate contracts are subject to the antitrust laws unless approved) *and* European Commer. Co. v. International Mercantile Marine Co., 1923 A.M.C. 211, 215 (S.D.N.Y. 1923) (to be a successful defense to a treble damage action the agreement must be approved); *with* American Union Transp. v. River Plate & Brazil Conferences, 126 F Supp. 91, 93 (S.D.N.Y. 1954), *aff'd per curiam on opinion below,* 222 F.2d 369 (2d Cir. 1955) (the failure to file an agreement permits relief under § 22 of the Shipping Act but does not subject the offending parties to the antitrust laws).

which have not been approved by the Commission is subject to the antitrust laws.[158]

It may be difficult to determine, however, whether the conduct charged is within the scope of an approved agreement. This situation usually arises when conferences or other groups are operating under basic agreements approved by the Commission, and a question arises whether the conduct is encompassed by the agreement or constitutes an independent, unapproved agreement subject to the antitrust laws. When questions involving the legality of the conduct arise, the matter should be referred to the Commission for determination.[159] If the legality of the conduct has already been adjudicated by the Commission, the doctrine is not applicable.[160]

Civil vs. Criminal Proceedings

The first case to consider the effect of the Shipping Act on criminal prosecutions under the antitrust laws was *United States v. Alaska S.S. Co.*[161] This was a civil action brought by the Government to

[158] Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 216 (1966).

Apart from the antitrust implications of the failure to obtain approval of § 15 agreements, such agreements are unenforceable and therefore may not be made the basis of an action for breach of contract. River Plate & Brazil Conferences v. Pressed Steel Car Co., 227 F.2d 60, 63 (2d Cir. 1955); Pacific Westbound Conference v. Leval & Co., 201 Ore. 390, 396, 269 P.2d 541, 543-44, *cert. denied*, 348 U.S. 897 (1954). In the *Pressed Steel* case, the court held the primary jurisdiction doctrine may not be invoked by the plaintiff in a breach of contract action when a failure to obtain § 15 approval is asserted by the defendant. The rationale was that it is only necessary in a breach of contract action to show the agreement was unlawful under the Shipping Act and therefore invalid and enforceable, but antitrust actions require a more extensive inquiry. *Cf.* American Union Transp. v. River Plate & Brazil Conferences, 126 F Supp. 91, 93 (S.D.N.Y. 1954), *aff'd per curiam on opinion below*, 222 F.2d 369 (2d Cir. 1955) note 157 *supra*, where the same court as that which decided the *Pressed Steel* case, with two of the same judges sitting on the panel, held, relying on *Cunard*, that the primary jurisdiction doctrine applies in a treble damage action even though the agreement was not approved.

[159] See United States v. Borax Consolidated, Ltd., 141 F Supp. 396, 397 (N.D. Cal. 1955), and Anglo Canadian Co. v. Haley, No. 38695, N.D. Cal., July 28, 1960 (unreported opinion) (action for breach of dual rate contract, and counterclaim for treble damages for failure to obtain approval of contract. Stay granted.) The test applied by *Carnation* to determine whether referral to the agency is necessary in treble damage actions is whether the conduct is arguably lawful under the Shipping Act. Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 222 (1966). A "substantial", "persuasive", or similar showing of legality should not be necessary because if the court requires such a showing before it will refer the question to the agency it is intruding upon the authority of the Commission to adjudge initially the validity of all agreements, whatever may be their form. See United States Nav. Co. v. Cunard S.S. Co., 284 U.S. 474, 487 (1932).

[160] Firestone Tire & Rubber Co. v. American President Lines, Ltd., 1966 A.M.C. 2595, 2599 (S.D.N.Y. 1966).

[161] 110 F Supp. 104 (W.D. Wash. 1952).

enjoin an alleged conspiracy between a steamship company and five of its officers to restrain and destroy competition in the Alaska trade, and a criminal prosecution against the same defendants for the alleged conspiracy Defendants invoked the primary jurisdiction doctrine by motions to dismiss, but it was urged by the Government that the doctrine was applicable only in civil actions, such as the *Far East Conference* case, and not where criminal actions are involved as well. The court rejected any distinction between criminal prosecutions and civil actions, stating, "all the arguments in favor of letting an experienced administrative board exercise its primary jurisdiction applies with equal force in a criminal case as in a civil case. The rationale applicable to the two types of action is the same."[162] Guided by the discussion in the *Far East Conference* case regarding the merits of dismissal versus stay, and following the result in that case, the district court dismissed both the indictment and the civil complaint. In doing so, the court overlooked the fact that in *Cunard* and *Far East Conference*, the plaintiffs sought injunctive relief, whereas the indictment in the *Alaska* S.S. case complained of past conduct, a distinction which, as *Carnation* shows, is of significant importance.

The question next arose in *In the Matter of Grand Jury Investigation of the Shipping Indus.*,[163] an investigation of possible criminal offenses in the shipping industry stemming from the findings of the Celler Committee in its investigation of the industry[164] Subpoenas were issued for the production of certain information, and motions to quash were filed. The contention was made by certain of the moving parties that, in view of the *Alaska* S.S. case, any indictments returned could not be upheld, and therefore the court should decide the jurisdictional question at the outset, to avoid a lengthy investigation to no purpose. The court ruled that the primary jurisdiction question was premature. The appropriate time to consider the question of primary jurisdiction would be upon the return of an indictment. To do so before then would be to "interpose the administrative agency between the grand jury (the so-called conscience of the community) and its investigation, by applying to the grand jury the doctrine of primary jurisdiction."[165]

The *Alaska* S.S. decision was distinguished on the ground that there the court had an indictment before it in its consideration of the primary jurisdiction question. However, the court added that the

[162] *Id.* at 111.
[163] 186 F. Supp. 298 (D.D.C. 1960).
[164] See note 14 *supra.*
[165] 186 F Supp. 298, 310 (D.D.C. 1960).

Alaska S.S. case "may have gone further by dismissing the indictment than would a court in this jurisdiction in a similar case."[166] Although it acknowledged that the primary jurisdiction doctrine may be applied to both civil and criminal actions, the court said, "it is more forceful in the civil regulatory type actions than in criminal actions, for in the latter actions the violations of other federal statutes may more often be involved, and the regulatory scheme less affected."[167]

The effect of the dismissal of the indictment in the *Alaska S.S.* case was a holding that the Shipping Act superseded the criminal provisions of the antitrust laws as applied to the shipping industry The doctrine of *pro tanto* repeal by implication was applied, rather than the principle of primary jurisdiction, which would have stayed the action pending an administrative determination of the legality of the defendants' conduct. When conduct is arguably lawful under the Shipping Act because it may fall within the scope of an approved section 15 agreement, an administrative determination must be made to avoid any conflict between the court and the Commission. The risk of such conflict, where the activity is of debatable legality, is present in criminal and civil actions under the antitrust laws, since if the conduct proves to be lawful under section 15 it receives antitrust immunity, criminal as well as civil. The primary jurisdiction doctrine thus has a definite place in criminal antitrust prosecutions in the shipping industry, as well as in civil actions. The application of the doctrine operates to stay, not oust, the court's jurisdiction. This will avoid the result of the *Alaska S.S.* case, which, viewed in the light of the *Carnation* decision, should have been a stay, rather than a dismissal.[168]

Treble Damages vs. Injunction: to Stay or to Dismiss

Before the decision in the *Carnation* case, the lower courts, in applying the doctrine, made no distinction between treble damage suits and criminal prosecutions for past activity on the one hand, and actions for injunctive relief for continuing conduct on the other. In each

---

[166] *Id.* at 309.

[167] *Id.* at 309. *Cf.* United States v. American Union Transp., Inc., 232 F Supp. 700, 702 (D.N.J. 1964) (dictum), stating that the doctrine is applicable to criminal prosecutions as well as to civil actions.

[168] *Cf.* United States v. Pacific & Arctic Ry. & Nav. Co., 228 U.S. 87 (1913), in which an indictment charged violations of the Sherman Act and the Interstate Commerce Act. The primary jurisdiction doctrine was held inapplicable to the Sherman Act counts, but at the time of the decision, there was no immunity provision under the Interstate Commerce Act similar to § 15. The conduct was therefore not arguably exempt from the antitrust laws.

type of action a dismissal was thought appropriate.[169] The *Carnation* decision placed injunction actions and suits for treble damages on different grounds. A suit for injunctive relief against continuing conduct can easily be reinstituted if the Commission finds the conduct violates the Shipping Act and is unapprovable, the Court observed in that case, but a treble damage action for past conduct cannot because of the likelihood of its being barred by the statute of limitations.[170]

A dismissal of a treble damage action was reversed in *Maddock & Miller, Inc. v. United States Lines*,[171] decided subsequent to the *Carnation* case. The court of appeals applied the *Carnation* rule and found that the lower court should have stayed plaintiff's treble damage cause of action instead of dismissing it.[172] Also, in *Carlos Crespo*

---

[169] United States v. Alaska S.S. Co., 110 F Supp. 104 (W.D. Wash. 1952) (civil action for injunction and criminal prosecution); American Union Transp., Inc. v. River Plate & Brazil Conferences, 126 F Supp. 91 (S.D.N.Y. 1954), *aff'd per curiam on opinion below*, 222 F.2d 369 (2d Cir. 1955) (treble damage action); Rivoli Trucking Corp. v. New York Shipping Ass'n, 167 F Supp. 940 (S.D.N.Y. 1956) (treble damage action); Maldonado v. Sea-Land Serv., Inc., 240 F Supp. 581 (D. Puerto Rico 1965) (treble damage action); United States v. Pacific Lumber Co., No. 34859, N.D. Cal., July 31, 1956 (unreported opinion) (dismissal of government's civil action to enjoin conspiracy in restraint of trade in export of lumber). *Cf.* Anglo Canadian Shipping Co. v. Haley, No. 38695, N.D. Cal., July 28, 1960 (unreported opinion) (stay of counterclaim for treble damages for failure to obtain approval of dual rate contract).

[170] 383 U.S. at 223. Actually there may be no need to reinstitute injunctive proceedings because, as stated in *Far East Conference*, if the Commission holds the conduct unlawful and unapprovable, and orders it discontinued, its order may be enforced by suit in a district court under § 29 of the Shipping Act. Far East Conference v. United States, 342 U.S. 570, 577 (1952).

[171] 365 F.2d 98 (2d Cir. 1966).

[172] The court of appeals held the *Carnation* decision indicated that another count of the plaintiff's complaint, alleging that one of the defendants received a rebate in violation of the Shipping Act, should also have been stayed rather than dismissed because the two year period for recovering reparations under the Shipping Act had expired during the pendency of the suit. The court believed that to insure the plaintiff a full and adequate remedy if the Commission found a violation of the Shipping Act, the district court should have retained jurisdiction of the Shipping Act cause of action also. 365 F.2d at 102. Thus where the period of limitations of the regulatory statute expires during the court proceeding, a stay protects the plaintiff's right to a full measure of relief. However, since the proper course at least in non-antitrust cases is to stay the action when the controversy is referred to the agency, the circuit court in *Maddock & Miller* need not have required an expiration of the regulatory period of limitations to reverse the lower court's dismissal of the rebate count. See text accompanying note 59 *supra*. Morrisdale Coal Co. v. Pennsylvania R.R., 230 U.S. 304, 314-15 (1913), suggests a different result where the regulatory period of limitations expired prior to the institution of the suit. There the plaintiff alleged that the defendant's tariff rule governing the allotment of coal cars was discriminatory. The Court ruled that the issue of whether the rule was discriminatory was within the primary jurisdiction of the ICC, but dismissed

Trucking Serv., Inc. v. Sea-Land Serv., Inc.,[173] motions to dismiss were denied and the action stayed, following the *Carnation* rule.

Application of Doctrine in Non-Antitrust Cases

General Applicability of Doctrine

The primary jurisdiction guidelines of the *Cunard* and *Far East Conference* decisions, although formulated in an antitrust context, have been applied by the lower courts in the non-antitrust shipping cases. The test is whether the controversy involves questions requiring for their resolution the Commission's specialized knowledge of the shipping industry, or issues which should be referred to the Commission to ensure uniformity in the regulation of the industry.[174]

The record shows, however, that this principle, like many others, is easier to state than to apply In the following paragraphs, specific instances in which the primary jurisdiction doctrine has been applied

---

the action because the two year period of limitations of the Interstate Commerce Act had expired prior to the filing of the complaint. *Cf.* United States v. Western Pac. R.R., 352 U.S. 59, 72-73 (1956), where the Court held that even after the expiration of the regulatory period of limitations, reference to the ICC of questions raised solely by way of defense and within the primary jurisdiction of the agency is appropriate.

[173] 260 F Supp. 858 (D. Puerto Rico 1966). *Cf.* Firestone Tire & Rubber Co. v. American President Lines, Ltd., 1966 A.M.C. 2595, 2599 (S.D.N.Y. 1966), holding that the stay directed in *Carnation* is not controlling in a treble damage action in which the plaintiff requires extensive discovery proceedings. The case involved the same inter-conference activity as that of the *Carnation* case, but the plaintiff here was not a party to the administrative proceeding as was the plaintiff in *Carnation.* The court held that while the appeal from the agency's decision was being resolved, the plaintiff could continue with discovery, and if trial approached before a final determination of the appeal, the defendant could renew his motion for a stay. The court stated "it is not the pendency of an action which creates danger of a conflict between Court and Commission; it is the making by the Court (whether with or without a jury) of a decision on the merits." *Id.* at 2599. The court distinguished *Carnation* on the ground that there the plaintiff had participated in the agency proceedings and did not need any further discovery in the antitrust proceeding. However, the stay was ordered in *Carnation* because the conduct was arguably lawful, as were the defendants' activities in the *Firestone* case because of the pending appeal of the administrative decision. This being the case, the defendants should not be put to the defense of an antitrust action when their conduct may later be found to be immune. The decision whether or not to stay a treble damage action should depend upon whether the activity is arguably lawful and not upon the plaintiff's discovery needs.

[174] Roberto Hernandez, Inc. v. Arnold Bernstein Schiffahrtsgesellschaft, M.B.H., 116 F.2d 849, 851 (2d Cir.), *cert. denied sub nom.*, Compania Espanola de Navegacion Maritima, S.A. v. Roberto Hernandez, Inc., 313 U.S. 582-83 (1941); Orleans Materials & Equip. Co. v. Isthmian Lines, Inc., 213 F Supp. 325, 329-30 (E.D. La.), *modified*, 218 F Supp. 322 (1963); Ackerman Importing Co. v. City of Los Angeles, 61 Cal. 2d 595, 601, 394 P.2d 566, 570 (1964); D. L. Piazza Co. v. West Coast Line, 119 F Supp. 937, 940 (N.D. Ill. 1953) (alternative holding).

or rejected by the lower courts are illustrated, as well as cases where the application of the doctrine, or at least its discussion, was suggested but the controversy was disposed of with no reference to primary jurisdiction. A review of the situations which required, or at least received, different treatment will illustrate the part the doctrine has played in the non-antitrust shipping cases.

The Doctrine Applied

Matters involving the interpretation of tariffs on file with the Commission are within the primary jurisdiction doctrine if a consideration of factors underlying the tariff is necessary.[175] However, where the Commission has already construed the tariff provision in controversy, no reference to the agency is necessary.[176] The doctrine is also applicable in actions involving a determination of the lawfulness and reasonableness of tariff charges,[177] and the validity of tariff exculpatory provisions.[178]

Where the issue is whether rates charged by a carrier are unjustly discriminatory, the matter is for the Commission to decide.[179] The

[175] Orleans Materials & Equip. Co. v. Isthmian Lines, Inc., 213 F Supp. 325, 331 (E.D. La.), *modified*, 218 F Supp. 322 (1963). The issue, according to the court, is whether the controversy involves a mere matter of construction as in Great No. Ry. v. Merchants Elevator Co., 259 U.S. 285 (1922), or is a matter for expert interpretation such as involved in United States v. Western Pac. R.R., 352 U.S. 59 (1956).

[176] Ken Royce, Inc., v. Pacific Transp. Lines, Inc., Admiralty No. 25527, N.D. Cal., August 25, 1952 (unreported opinion). The court's decision was reached in an unusual manner. The libelant sought to recover alleged excessive freight charges. Respondent moved to dismiss on the ground that the issues had already been adjudicated by the Commission. At a special hearing, it was stipulated that the court should rule on the issue, treating the libel as a *de novo* action in admiralty, not as a review of the decision of the Commission. The court found that the resolution of libelant's contractual rights depended upon an interpretation of a maritime tariff, a function vested in the Commission. Declining to hold that the decision of the Commission was *res judicata* of the issue, the court concluded that the agency's determination had the effect of settling libelant's contractual rights, with the result that the alleged contractual right of the libelant failed, for lack of foundation, and nothing remained but to dismiss the libel. A different approach leading to the same result is suggested by the opinion in United States v. Western Pac. R.R., 352 U.S. 59, 69 (1956), where the court stated there would be no need to refer the matter to the agency if it had already construed the particular tariff, or had clarified the factors underlying it. Using this less convoluted approach, the district court would have applied the Commission's definition of the tariff to the libelant's claim and dismissed the libel. This was the procedure followed in Burroughs Corp. v. Black Diamond S.S. Corp., 4 P & F Ship. Reg. Rep. 21,039, 21,040 (Sup. Ct., N.Y., Cty. 1967).

[177] Port of Bandon v. Oliver J. Olson & Co., 175 F Supp. 736, 741 (D. Ore. 1959) (lawfulness of port charge covering services alleged by respondent to be fictitious).

[178] Bird v. S.S. Fortuna, 262 F Supp. 24, 27 (D. Mass. 1966); Ackerman Importing Co. v. City of Los Angeles, 61 Cal. 2d 595, 394 P.2d 566, 571 (1964).

[179] D. L. Piazza Co. v. West Coast Line, Inc., 119 F Supp. 937, 940 (N.D. Ill. 1953) (alternative holding).

doctrine is also applicable to a carrier's alleged refusal to provide available cargo space, a matter which involves factual questions relating to the correct methods of stowing the cargo in question.[180]

In one case the primary jurisdiction doctrine was applied to a determination of whether a carrier's purchase of supplies from a shipper constituted a rebate to that shipper.[181] That determination "may well depend on an appraisal of the economic effect upon the carrier's shipping rates of the price paid for the tied supplies; this in turn may require an inquiry into the profit earned on the chinaware and whether it significantly alters the cost of shipping on the line."[182] The court also stated that a holding that a carrier's agreement to purchase supplies from a shipper is a rebate might have widespread impact upon the whole regulatory scheme, and the matter is better left to the Commission. However, the granting of a rebate may involve a simple transaction. Since common carriers by water are required to publish and observe uniform tariff rates, kick-back payments to a shipper by a carrier or reduced billings which result in cut rates, are so obviously rebates that no expertise seems required to classify them as such. Rebates are unconditionally prohibited by the Shipping Act, and there is no problem of possible immunity Only when the facts involve subtle practices, unlike the direct payment of money or other obvious devices, should recourse to the Commission be necessary to determine whether the transaction amounts to a rebate.

The doctrine also applies to the lawfulness of an embargo, which requires analysis by a single tribunal constituted to pass on such questions in order to ensure uniformity in the impact of the embargo on the public.[183] In two related cases the doctrine was applied to controversies involving whether conduct constituted the use of fighting ships.[184]

---

[180] Robert Hernandez, Inc. v. Arnold Bernstein Schiffahrtsgesellschaft, M.B.H., 116 F.2d 849, 851 (2d Cir.), *cert. denied sub. nom.*, Compania Espanola de Navegacion Maritima, S.A. v. Roberto Hernandez, Inc., 313 U.S. 582-83 (1941).

[181] Maddock & Miller, Inc. v. United States Line, 365 F.2d 98, 100 (2d Cir. 1966).

[182] *Ibid.*

[183] See Holt Motor Co. v. Nicholson Universal S.S. Co., 56 F Supp. 585, 591-92 (D. Minn. 1944) (dictum). The court held that the matter was one which should be determined by the agency, but proceeded to resolve the question in the carrier's favor after assuming, for the purposes of disposing of the matter, that the court had jurisdiction to decide the issue. The court's decision on the merits set up a risk of conflict with the exercise of the agency's jurisdiction over the embargo in a possible subsequent proceeding.

[184] Wisconsin & Mich. Transp. Co. v. Pere Marquette Line Steamers, 210 Wis. 391, 396, 245 N.W 671, 673 (1932); Wisconsin & Mich. Transp. Co. v. Pere Marquette Line Steamers, 67 F.2d 937 (7th Cir. 1933).

The Doctrine Rejected

In the following situations the courts considered the primary jurisdiction doctrine and rejected its application to the particular controversy involved.

The doctrine is not applicable to grand jury proceedings.[185] Also, where provisions of dual rate contract clauses are used in a general commercial sense, their interpretation is not a matter on which the Commission has special competence, and the doctrine would not be applicable to controversies involving such interpretations.[186] Dual rate contracts are complex, however, and construing them may require an examination and analysis of a variety of transportation factors underlying the particular terminology used, a task for which the Commission is better suited than the courts.[187] An action to enforce an arbitration provision of a dual rate contract is not within the primary jurisdiction of the Commission.[188]

Where the Commission had no original jurisdiction over the controversy because it related to a tramp vessel not subject to the Shipping Act, the primary jurisdiction doctrine was not applicable.[189] Nor was it applicable where the plaintiff had no remedy under the Shipping Act against the defendant because the latter was not subject to the act.[190]

---

[185] See In the Matter of Grand Jury Investigation of the Shipping Indus., 186 F Supp. 298, 311 (D.D.C. 1960). The court, after holding the doctrine inapplicable, did not entirely foreclose the application of the doctrine to all grand jury proceedings, but stated that any such application would be rare. *Ibid.* In view of the fact that grand jury investigations are limited to inquiries of probable violations of criminal law, rather than the enforcement of such laws, the doctrine would not seem to have any applicability until the grand jury concludes its deliberations, at which time charges, if any, can be analyzed to determine whether there is a likelihood of conflict with the agency's jurisdiction if judicial proceedings are instituted.

[186] See Anglo Canadian Shipping Co. v. United States, 264 F.2d 405, 414 n.15 (9th Cir. 1959).

[187] See United States v. Western Pac. R.R., 352 U.S. 59, 65-67 (1956).

[188] Joseph Amelar, Inc. v. Far East Conference, 229 F Supp. 450-51 (S.D.N.Y. 1964); In the Matter of Pasch, 26 Misc. 2d 925, 928, 210 N.Y.S.2d 738, 743 (Sup. Ct. N.Y. Cty. 1960), *aff'd*, 13 App. Div. 2d 470, 214 N.Y.S.2d 644 (1961). In American President Lines, Ltd. v. S. Woolman, Inc., 239 F Supp. 833 (S.D.N.Y. 1964), the court granted the motion to compel arbitration with no discussion of primary jurisdiction.

[189] Brown & Williamson Tobacco Corp. v. S.S. Anghyra, 157 F Supp. 737, 752 (E.D. Va. 1957).

[190] See Prince Line, Ltd. v. American Paper Exports, Inc., 55 F.2d 1053, 1056 (2d Cir. 1932) (alternative holding). Plaintiff carrier knowingly received falsely classified goods from defendant shipper, as the result of which defendant obtained transportation at rates less than those otherwise applicable, in violation of § 16. Plaintiff's conduct did not bar him from recovering the difference between the tariff rate and the rate actually charged. The primary jurisdiction doctrine was held inapplicable because the defendant,

The Doctrine Ignored

In the following cases involving violations or alleged violations of the laws administered by the Commission, there was no discussion of the primary jurisdiction doctrine, although the application of the doctrine, or at least a discussion of it, was suggested by the subject matter of the controversy and by decisions in other cases dealing with similar controversies.

In a series of cases involving the question of whether contracts under which a shipper is granted a rate other than that established under the carrier's tariff are unlawful, the primary jurisdiction doctrine was not discussed.[191] Other controversies in which the doctrine was not mentioned were a construction of a carrier's tariff provision relating to the right to discharge cargo at alternative locations where

a shipper, was not subject to the Shipping Act, and therefore plaintiff could not bring an action for reparations under § 22 against defendant since such action may be brought only against parties subject to the act. However, the agency has suggested that while shippers are not subject to the act, the express subjection of shippers to § 16 may also subject them to reparations proceedings for violations of § 16. Aluminum Prods., Inc. v. Trans-Caribbean Motor Transp., Inc., 5 F.M.B. 1, 2 n.1 (Dkt. No. 763, 1956). *Cf.* Dampskibsselskabet Torm A/S v. P. L. Thomas Paper Co., 26 App. Div. 347, 274 N.Y.S.2d 601 (1966), where, on facts similar to the *Prince Line* case, the court held that the doctrine was inapplicable, not because the defendant shipper was not subject to the act, but because no expertise was required for the determination of the illegality under § 16 of the false billing practices in question.

[191] Ambler v. Bloedel Donovan Lumber Mills, 68 F.2d 268 (9th Cir. 1933); Belmont Iron Works v. Pacific Coast Direct Line, Inc., 249 App. Div. 156, 291 N.Y.S. 360 (1936); Sands v. Calmar S.S. Corp., 163 Misc. 757, 296 N.Y.S. 590 (Sup. Ct. Monroe Cty. 1937). All three cases cited Prince Line, Ltd. v. American Paper Exports, Inc., 55 F.2d 1053, 1055 (2d Cir. 1932), which held such contracts destroy equality among shippers and are unlawful. See note 190 *supra.* However, in the *Prince Line* case, primary jurisdiction was held inapplicable because the plaintiff had no recourse under the Shipping Act against the defendant shipper, who was not subject to the act. In the *Belmont* and *Sands* cases the shipper was the plaintiff, and this jurisdictional bar was not present, because persons not subject to the Shipping Act may institute reparations proceedings under § 22 if the defendant is subject to the act. Rivoli Trucking Corp. v. New York Shipping Ass'n, 167 F Supp. 940, 942 (S.D.N.Y. 1956), *motion for leave to file amended and supplemental complaint denied,* 167 F Supp. 943 (1957). However, even though a Shipping Act remedy existed in the *Belmont* and *Sands* cases, a controversy in which a single shipper is granted a special rate less than that otherwise applicable to the commodity under the carrier's tariff, requires no specialized knowledge of the shipping industry. Since such transactions are unqualifiedly prohibited by the Shipping Act, the inquiry is limited to a determination of the tariff rate, and a finding that a cheaper rate was granted to the shipper. This does not necessarily rule out the application of the doctrine in all cases under § 16 involving alleged unfair devices to allow transportation at less than the regular rates. Such devices may be more subtle than offering cut rates, and their treatment may require tariff construction or an evaluation of involved shipping practices aimed at reducing freight charges. The Commission's specialized knowledge would materially assist the court in the resolution of such controversies.

a strike had tied up the scheduled pier,[192] a ruling that a special contract of affreightment did not constitute an unfair or unjustly discriminatory cargo space accommodation contract with a shipper under section 14,[193] a finding of illegal overcharges resulting from a false certificate,[194] a determination that an oral waiver of the one year period of limitations of the Carriage of Goods by Sea Act[195] would not be a discriminatory contract or arrangement to give the libelant an unreasonable preference over other shippers in violation of sections 14 and 16,[196] and a holding that the activities of a steamship company did not constitute a common carriage operation.[197]

In analyzing these decisions it would seem that an interpretation of tariff language which is not used in any peculiar or technical sense and a controversy concerning illegal overcharges based upon clearly false certificates, are not questions requiring the judgment of a body of experts familiar with the shipping industry Also, whether waivers of time limitation provisions of one statute violate regulatory provisions of another statute are more suitable for resolution by a court than the agency charged with the duty of enforcing the regulatory statute. However, a determination of whether an affreightment contract unjustly discriminates between shippers in the matter of cargo space accommodations under section 14 may involve complex considerations, two of which, the proper loading of the vessel and the available tonnage, are specifically mentioned in section 14. This section allows certain latitude because it prohibits only contracts which "unjustly" discriminate and does not outlaw all discrimination in such matters. Whether discrimination has reached the point of being unjust is a question which the Commission, rather than a court, is better equipped to answer. The same is true of controversies involving a determination of whether activities of a steamship line constitute common carriage by water.

Other Complementary Roles of Court and Commission

The discussion thus far has been concerned with defining the areas in which, through the application of the doctrine of primary

---

192 Bull-Insular Line v. National Sugar Ref. Co., 180 F Supp. 216 (E.D. Pa. 1960).

193 Copper River Packing Co. v. Alaska S.S. Co., 22 F.2d 12 (9th Cir. 1927); R. L. Heflin, Inc. v. Texas Oceanic S.S. Co., 53 S.W.2d 133 (Tex. Civ. App., 1932).

194 United States v. Garcia & Diaz, Inc., 291 F.2d 242 (2d Cir. 1961).

195 49 Stat. 1208 (1936), 46 U.S.C. § 1303(6) (1964).

196 The Argentino. Buxton S.A.N. Reder, 28 F Supp. 440 (S.D.N.Y. 1939).

197 United States v. Stephen Bros. Line, 4 P & F Ship. Reg. Rep. 20,864, 20,866 (S.D. Fla. 1966).

jurisdiction, the administrative function complements the judicial process. There are, conversely, other areas in which the integrity of the regulatory scheme requires that judicial proceedings be utilized to supplement agency jurisdiction. Suits to recover Shipping Act penalties and to aid the Commission's jurisdiction are means by which court jurisdiction augments the administrative function and promotes effective regulation. The question of the applicability of the primary jurisdiction doctrine has often arisen in these proceedings. Whether the doctrine has any function in this type of litigation will be discussed in this section.

Judicial Enforcement of Shipping Act Penalties

Section 15, relating to the filing of agreements between carriers, conferences of carriers and other persons subject to the act, contains the following penalty provision: "Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."[198] In such civil actions, the primary jurisdiction doctrine, although urged, has not been applied.

The Government filed section 15 penalty actions in *United States v. Ditlev-Simonsen Lines;*[199] *United States v. Federal Steam Nav. Co.;*[200] and *United States v. Anchor Line, Ltd.*[201] In each case a motion to dismiss on primary jurisdiction grounds was denied. The courts found that no expertise was required to determine whether the defendants had complied with the statute. The *Ditlev-Simonsen* and *Anchor Line* opinions emphasized the fact that the penalty provision of section 15 requires the fine to be recovered in a "civil action," which could only mean a court suit, not a proceeding before the Commission. *Anchor Line* distinguished the antitrust cases on the ground they involve complicated issues.

Before discussing the principle of these cases, the holding in *United States v. American Union Transp., Inc.*,[202] should be considered. That was a criminal proceeding charging that a carrier, its

---

[198] 39 Stat. 733 (1916), as amended, 46 U.S.C. § 814 (1964). As of the time of the 1959 hearings of the Celler Committee's investigation of the shipping industry, no proceeding had ever been instituted to enforce this penalty provision. CELLER REPORT 360-61. See note 14 *supra.*

[199] 4 P & F Ship. Reg. Rep. 20,832 (N.D. Cal. 1964).

[200] P & F Ship. Reg. Rep. 20,910 (S.D.N.Y. 1965).

[201] 257 F Supp. 99 (S.D.N.Y. 1965).

[202] 232 F Supp. 700 (D.N.J. 1964).

agents and a shipper were guilty of violating the criminal provisions of section 16, which specify that a violation of that section is a misdemeanor punishable by a fine. The information charged that the carrier, through its agents, knowingly accepted the shipper's allegedly false measurements, as a result of which the carrier allowed the shipper to obtain transportation at less than the applicable rates and thereby gave him an undue and unreasonable preference over other shippers, in violation of section 16. On defendants' motion to dismiss based on primary jurisdiction, the court conceded that the doctrine was applicable to criminal prosecutions as well as to civil actions,[203] but stated that nothing in the Shipping Act gave the Commission the power to determine the guilt or innocence of any person charged with a violation of the criminal provisions of the act, or the power to impose a penalty for such violations. "The Commission has no power to regulate such conduct because it is specifically prohibited by the statute. The Commission's regulatory power would in no way be affected by a prosecution seeking to punish past violations of the Act."[204] The *Pacific & Arctic* case, in which the doctrine was applied to the counts alleging violations of the criminal provisions of the Interstate Commerce Act, was distinguished on the ground that it involved a single large conspiracy and presented complicated factual issues requiring the experience of the Commission before criminal charges were prosecuted. A determination of whether the alleged conduct violated section 16 was "a simple question of law—the interpretation of the intent of the statute—and, on this question, the experience of the Commission is irrelevant."[205]

The opinions in the section 15 fines cases appear to exclude all application of the primary jurisdiction doctrine to such suits. In doing so, the dual nature of these penalty proceedings is overlooked. It is true that the recovery of a section 15 penalty requires a judicial, rather than an agency, proceeding. However, the assessment of the fine is predicated upon a showing that section 15 has been violated, and as to that aspect of the case the doctrine has utility If, for example,

---

[203] Citing United States v. Pacific & Arctic Ry. & Nav. Co., 228 U.S. 87, 106-08 (1913); United States v. Alaska S.S. Co., 110 F Supp. 104, 111 (W.D. Wash. 1952); In the Matter of Grand Jury Investigation of the Steamship Indus., 186 F Supp. 298, 309 (D.D.C. 1960).

[204] 232 F Supp. at 703.

[205] *Id.* at 704. *Cf.* United States v. Peninsular & Occidental S.S. Co., 208 F Supp. 957 (S.D.N.Y. 1962), involving an information charging a violation of § 16 by a carrier and its agents in knowingly permitting a shipper to obtain transportation at other than regular rates by an unjust device. Primary jurisdiction was not mentioned.

the court were faced with the question of determining whether the alleged conduct of the defendants went beyond the scope of an approved agreement and therefore involved the implementation of an unapproved agreement, difficult factual questions may be involved, relating to the scope and operation of the approved agreement, on which the Commission's views would be valuable. A finding by the court that the activity exceeded the scope of the approved agreement and a resulting assessment of fines might conflict with a subsequent proceeding before the Commission in which the agency might determine that the approved agreement was sufficiently broad to encompass the activities of the defendants.[206]

Moreover, while antitrust proceedings admittedly are complex, the issues referred to the Commission in such cases are not antitrust issues, but ordinarily relate only to whether or not the activities charged are within the scope of approved agreements. This may be the same type of issue requiring resolution in a section 15 penalty case before the penalty can be assessed by the court, and the need for a referral to the Commission in the one instance is as compelling as it is in the other.[207]

As to the enforcement of the criminal provisions of section 16, the *American Union Transp.* case involved ten alleged instances of know-

---

[206] "The plaintiffs in the Cunard and Far East Cases were seeking to enjoin activities which allegedly implemented unapproved agreements even though the Commission had never determined whether those alleged activities constituted the implementation of unapproved agreements. There was a real risk that the District Court might find that the defendants had implemented unapproved agreements while the Commission might find in some later proceeding that the same activities constituted the implementation of approved agreements. This Court decided that the danger of such a conflict could best be avoided by holding that one tribunal or the other has the exclusive right to make the initial factual determination. Since the Commission has specialized knowledge of the industry, the Court concluded that such primary jurisdiction should be vested in the Commission and accordingly instructed the District Court to refrain from acting until the Commission had ascertained and interpreted the circumstances underlying the legal issues." Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 220-21 (1966).

[207] Of course, if there is no approved agreement arguably encompassing the defendants' activities, and the circumstances merely involve entering into an agreement covered by § 15 without Commission approval, no intricate questions of fact need be resolved to predicate the recovery of penalties under § 15. And where the Commission has already determined that the defendants' conduct violates § 15, no referral is necessary in a subsequent penalty proceeding, since the court already has the views of the Commission, and the agency's task has been completed. The test should be whether the conduct is arguably lawful. Where the doctrine is applied, proceedings should be stayed rather than dismissed. Penalty cases, like treble damage actions, are based on past conduct, and the assessment of the penalty will not interfere with any future action by the Commission. Also, the statute of limitations may expire before the Commission makes its determination, thus barring a subsequent proceeding.

ing acceptance by the carrier of the shipper's allegedly false measurements. The court found nothing in such a factual situation requiring the assistance of the Commission, and where false billing, classification, weighing and reporting practices are concerned, that would frequently be the case. No expertise would ordinarily be required to establish these false practices, and there is no danger of upsetting the uniformity of the regulatory scheme because, unlike conduct under section 15, such practices are prohibited under all circumstances.[208]

This does not mean, however, that the doctrine has no place in section 16 criminal proceedings. Some arrangements designed to obtain transportation at less than the regular rates might be more involved, and their determination might require tariff construction or the evaluation of industry practices intended to reduce freight charges, as to which the Commission's specialized knowledge would be of aid. Section 16 also prohibits common carriers and other persons covered by the act from subjecting "any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."[209] Here some measure of latitude is permitted. Prejudice and disadvantage are allowed, and it is only when they become "undue or unreasonable" that they are prohibited. The Commission, with its peculiar knowledge of conditions existing in the industry, perhaps justifying some prejudice or disadvantage, is better able to determine whether, in the circumstances of the case, the prejudice or disadvantage is "undue or unreasonable" In a criminal action seeking penalties for a violation of this provision of section 16, a determination by the Commission that the conduct had exceeded the latitude permitted would be of substantial benefit to the court.[210]

---

208 The relatively uncomplicated proof ordinarily required to establish such false practices under § 16 results in four possible proceedings which are available to obtain relief: the Commission may institute an investigation to order that the carrier and/or the shipper cease and desist from continuing such practices, Hohenberg Bros. Co. v. Federal Maritime Comm'n, 316 F.2d 381 (D.C. Cir. 1963); a § 22 proceeding may be brought before the Commission by a party injured by the practices, Port Comm'n v. Seatrain Lines, Inc., 3 F.M.B. 556 (Dkt. No. 675, 1951); a judicial proceeding may be filed to recover damages resulting from the practices, Prince Line, Ltd. v. American Paper Exports, Inc., 55 F.2d 1053 (2d Cir. 1932); Dampskibsselskabet Torm A/S v. P. L. Thomas Paper Co., 26 App. Div. 347, 274 N.Y.S.2d 601 (1966); or a criminal prosecution may be instituted to enforce the penalty provisions of § 16, U.S. v. Peninsular & Occidental S.S. Co., 208 F Supp. 957 (S.D.N.Y. 1962); United States v. American Union Transp., Inc., 232 F Supp. 700 (D.N.J. 1964).

209 39 Stat. 734 (1916), as amended, 46 U.S.C. § 815 (1964).

210 As in the § 15 penalty cases, the doctrine, when applicable to a § 16 criminal

Judicial Proceedings to Maintain the Status Quo

The primary jurisdiction doctrine has been asserted in judicial proceedings which seek to preserve the status quo pending action by the Commission. The doctrine is not applicable to such proceedings because the relief sought will aid rather than interfere with the exercise of the Commission's jurisdiction.

The leading case is *West India Fruit & S.S. Co. v. Seatrain Lines, Inc.*,[211] in which the defendant carrier announced proposed rate cuts in its service from New Orleans to Havana. Plaintiff, a competing carrier, filed a complaint with the Commission, alleging that the proposed rate reductions were unlawful. With the approval of the Commission, plaintiff brought an action in the district court seeking to enjoin defendant from putting its rate reductions into effect pending the Commission's decision. The Commission thereafter petitioned to intervene in the judicial proceeding, alleging that the complaint it received from plaintiff showed a prima facie case for the exercise of its jurisdiction, and that unless the status quo were maintained, the agency might be unable to protect private and public interests which might be adversely affected by the proposed rate reductions. In holding that an injunction was proper, the court of appeals distinguished the *Cunard* case, stating that *Cunard* "imposed limitations on the power of the courts to interfere with the exercise of an administrative agency's powers. Here the court was asked to assist the Commission by preserving the status quo until it could determine whether it had statutory jurisdiction, and, if so, how it should act."[212] This is the essential distinction between the primary jurisdiction cases and those seeking to preserve the status quo pending an administrative determination.[213]

Injunctive relief has been granted to maintain the status quo pending the agency's adjudication of the legality of conference agree-

---

action, should operate only to stay the proceeding. A dismissal would be inappropriate because past conduct is involved and an assessment of a fine will not interfere with any future Commission action. Also, the expiration of the statute of limitations is of concern.

[211] 170 F.2d 775 (2d Cir. 1948), *cert. dismissed*, 336 U.S. 908 (1949).

[212] *Id.* at 779.

[213] *Cunard* and *Far East Conference* were distinguished in Pennsylvania Motor Truck Ass'n v. Port of Philadelphia Marine Terminal Ass'n, 183 F Supp. 910 (E.D. Pa. 1960), on the ground that they hold district courts have no jurisdiction in antitrust suits to determine the legality of agreements. "Such issues are within the exclusive competence and primary jurisdiction of the expert administrative agency—the Federal Maritime Board. But, in those cases there was no question raised as to the propriety of the Court in issuing an injunction to hold the matter in status quo." *Id.* at 915-16.

ments,[214] and to enjoin the enforcement of tariff amendments pending the Commission's determination of their legality.[215]

Summary and Conclusions

The impact of the primary jurisdiction doctrine is most widely felt in accommodating the antitrust and regulatory laws. Unlike the principle of repeals by implication, primary jurisdiction does not require a finding that the antitrust laws have been displaced. The doctrine is invoked when activity prohibited by the antitrust laws may arguably be immunized by the regulatory statute, and an administrative determination of that issue is required before the question of antitrust liability is resolved. In some instances, repeals by implication have been found under the guise of primary jurisdiction. The distinction between the two principles should, however, be kept in mind because the decision of whether or not to apply the primary jurisdiction doctrine may be influenced by the court's mistaken belief that to do so would require that the suit be dismissed. Rather than apply the doctrine with such harsh consequences a conclusion might be reached that the doctrine does not apply to the controversy

The primary jurisdiction doctrine is applicable in treble damage antitrust shipping cases when the activity is arguably within the scope of an approved agreement. Only the protection of section 15 can prevent the application of the antitrust laws. However, even where the activity cannot be immunized, issues within the specialized competence of the Commission may be referred to the agency if their determination may have an important bearing on the outcome of the antitrust proceeding.[216] But the mere fact that the activity may fall within other sections of the act should not, of itself, be sufficient to stay the proceeding since virtually all treble damage shipping cases may have potential Shipping Act issues, the resolution of which by the Commission would not materially assist the court.

When the antitrust action seeks injunctive relief the *Cunard* and

---

[214] Isbrandtsen Co., Inc. v. United States, 81 F Supp. 544, 546 (S.D.N.Y. 1948), *appeal dismissed sub. nom.*, A/S J. Ludwig Mowinckels Reder v. Isbrandtsen Co., 336 U.S. 941 (1949).

[215] Pennsylvania Motor Truck Ass'n v. Port of Philadelphia Marine Terminal Ass'n, 183 F Supp. 910, 918 (E.D. Pa. 1960). See United States Trucking Corp. v. American Export Lines, Inc., 146 F Supp. 924 (S.D.N.Y. 1956). There the court acknowledged that injunctive relief could be granted in such circumstances, but concluded that, on the facts, the plaintiffs failed to prove either irreparable injury or a balance of the equities in their favor. *Id.* at 926.

[216] Maddock & Miller, Inc. v. United States Lines, 365 F.2d 98, 102 (2d Cir. 1966). See note 153 *supra.*

Far East Conference decisions govern. Even if the court is able to determine that the conduct has not been immunized, an injunction may still interfere with a subsequent determination by the Commission that the activity should be given prospective approval. Permanent injunctive remedy has been superseded by a section 22 complaint to determine the legality of the conduct under section 15, and, if the activity is found unlawful and unapprovable, an enforcement proceeding in a district court under section 29 may be filed if necessary Interim injunctive relief in some situations may not interfere with the agency's jurisdiction, and, just as in the cases in which courts grant injunctive relief to maintain the status quo pending an agency determination, a court could, upon an appropriate showing, restrain the conduct pending the Commission's determination. However, even where only interim injunctive relief is sought, the court should consider whether the conduct is arguably within the scope of an approved agreement. If so, there is a risk that the interim relief will interfere with the agency's approval of the conduct, and interim relief should not be granted.

Where treble damage relief or the criminal or civil penalty provisions of the Shipping Act are sought to be enforced, there is less risk of interference with the Commission's jurisdiction than in injunction proceedings where the relief sought is prospective. Relief for past conduct will not conflict with a subsequent agency determination, and the right to obtain relief for past conduct under the antitrust laws is therefore not displaced by the Shipping Act. Any accommodation must be by means of the primary jurisdiction doctrine. If the conduct is of debatable legality, the proceedings must be stayed and the issue referred to the Commission.

The doctrine is also applicable in non-antitrust cases. Here there is no need for an accommodation between two statutory schemes, and the doctrine's use is to promote uniformity in the regulation of the industry, and to utilize the specialized competence of the Commission to aid the judicial process. The question of whether the court or the Commission is the appropriate tribunal to hear the controversy is in some instances answered by the statute itself. Under sections 14 and 15, approval or disapproval of dual rate contracts and other agreements are matters for the Commission, not the courts. Where unjustly discriminatory rates or unjust and unreasonable practices are found under section 17, it is the Commission, and not the courts, which must correct these conditions. Where rates in foreign commerce are unreasonably high or low, the Commission has the duty to disapprove

them under section 18. The courts are, however, expressly charged with the duty to entertain criminal proceedings instituted to enforce the criminal provisions of sections 14 and 16, and civil actions to recover penalties for violations of sections 14b, 15 and 18.

Where the act does not identify the appropriate tribunal, the character of the wrong may suggest the answer. There are three general types of offenses covered by the Shipping Act. The first category consists of specific acts which are prohibited. These offenses can be established by direct proof, without the need for analysis. Examples include determinations under section 18 of whether or not a carrier has filed tariffs with the Commission or has assessed rates other than those in his tariff, an ocean freight forwarder's failure to obtain a license from the Commission as required by section 44, and the giving and receiving of information to the detriment of a shipper, consignee or carrier under section 20.

The second category of offenses consists of acts which are measured by standards purposely framed in general terms. This group includes discriminatory or unfair practices against shippers under section 14 Third, unjust or unfair devices to grant or obtain transportation at non-tariff rates under section 16, unjust or unreasonable practices in the receiving and delivering of property under section 17, and unjust or unreasonable rates under section 18. The terms "discriminatory or unfair", "unjust or unfair" and "unjust or unreasonable", are general terms and some degree of analysis is required instead of merely a determination that a specific act was or was not done.

The third category consists of conduct which, while discriminatory, unfair or prejudicial, is not unlawful until it exceeds the maximum latitude permitted by the act. Section 14 Fourth prohibits unjustly discriminatory contracts with shippers and unjust discrimination against shippers in certain matters. Undue or unreasonable preferences or prejudices against persons, localities or descriptions of traffic are unlawful under section 16 First, and unjustly discriminatory rates and charges are prohibited by section 17 Some activities may therefore be discriminatory or prejudicial without violating the Shipping Act, but are unlawful when they become "unjustly", "unduly" or "unreasonably" so. These are questions of degree and the tribunal is given the discretion to determine whether, in view of the transportation conditions, the conduct is sufficiently harmful to be prohibited.

The Commission with its specialized knowledge of industry conditions is better equipped to resolve controversies charging offenses

included in the third category Those in the first category, which do not require analysis of the facts, are as amenable to adjudication by the courts as the Commission.[217] The offenses included in the second category require some degree of analysis and, while in the determination of their legality the tribunal is not given the same measure of discretion as it is in adjudicating offenses falling within the third category, the general nature of the standard to be applied indicates that the resolution of controversies involving these offenses is better left to the expertise of the Commission. This is compatible with the decisions under the Interstate Commerce Act which apply the doctrine to activity measured by general standards such as the fairness and reasonableness of rates, and tariff classifications, rules and practices.[218]

Finally, the doctrine can be useful in the enforcement of civil and criminal Shipping Act penalties. Where the unlawfulness of the conduct has already been established or the conduct is not arguably within an approved agreement, and the suit is only to collect the fine or penalty, the doctrine has no purpose. But this should not rule out the doctrine's application in appropriate situations in which legality is in doubt. In a section 15 penalty action where the legality of the defendant's conduct is in question, the same issue is present as that in the antitrust cases; i.e., whether the activity constitutes the implementation of an approved agreement. If it does, neither the antitrust laws nor the section 15 penalty applies. In the non-section 15 penalty or fine proceedings where the conduct has not been held unlawful by the Commission and the nature of the controversy involves the resolution of complex or technical questions, an initial determination by the Commission would be of substantial benefit to the court. In a suit to recover section 16 fines, for example, the issue may be whether the conduct amounted to undue or unreasonable prejudice against a particular person, locality or description of traffic. Whether the prejudice has reached the point of being undue or unreasonable is something the Commission is better able to decide.

When the doctrine is applied in such enforcement proceedings an initial determination of the legality of the activity under the Shipping Act can be made by the Commission, and, if a violation is

[217] See United States v. Stephens Bros. Line, 4 P & F Ship. Reg. Rep. 20,864 (S.D. Fla. 1966), an action by the Government seeking penalties for the alleged failure to file tariffs. The court considered the case on the merits and concluded that the defendant was not a common carrier by water and thus was not subject to tariff filing requirements. Primary jurisdiction was not discussed.

[218] See text accompanying notes 48-54 *supra*.

found, the judicial proceedings may resume and the penalty or fine recovered by the Government as contemplated by the act. In dealing with practices as intricate and technical as many are in the shipping industry, the risk that some activity which to the court appears to violate the Shipping Act with attendant criminal penalties, may be justified by transportation conditions, appears well worth the delay in securing an administrative determination.